Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1994

THE VILLAGE OF SEBRING,

*Petitioner,*

vs.

MARK E. WAYNE; CARLA L. WAYNE; ROLAND L. KENDRICK; BRET E. SMITH; BRENDA S. SMITH; ROBERT J. ROUSE, JR.; SHARON ROUSE; DONALD G. STILLION; BEVERLY J. STILLION; WILLIAM H. TUEL; MARJORIE R. TUEL; CLAUDE J. BAILEY; MARGARET J. BAILEY; LARRY L. HARTLEY; KATHLEEN J. HARTLEY; JUDY K. COSTELLO; NANCY STUCHELL; and JEFFREY STUCHELL,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, in an action under 42 U.S.C. § 1983 against a municipality and its officials in their official and individual capacities, a municipality waives its rights under Fed. R. Civ. P. 30(a) by not proceeding with depositions of the plaintiffs and of the plaintiffs' witnesses during the pendency of the individual capacity municipal defendants' motion for judgment on the pleadings on the basis of qualified and legislative immunity, in reliance on the well-established Supreme Court principle that no discovery should be conducted during the pendency of a dispositive pleadings motion based on qualified or other immunity.

2. Whether persons residing outside the boundaries of a municipal corporation have a federal right of action under 7 U.S.C. § 1926(b) and 42 U.S.C. § 1983 against the municipality where the municipality conditions new or transferred water service outside its boundaries on an agreement to annex, and where the municipality had earlier received a loan under 7 U.S.C. § 1926(a)(1).

3. Whether, in a nondiversity case, a United States District Court can exercise supplemental jurisdiction over a purported state law cause of action when the courts of that state have unambiguously rejected the existence of any such cause of action and no substantial federal question exists.

4. Whether a Circuit Court of Appeals may remand, for District Court determination, a purported claim as to which the plaintiffs presented no evidence at trial.

## LIST OF PARTIES

In addition to the parties listed in the caption, the following were, in their individual capacities, Defendants-Appellants and Cross-Appellees in the Sixth Circuit Court of Appeals proceeding: J. Michael Pinkerton, James R. Conny, John W. Smith, Douglas L. Eaton, James V. Daniels, Alan C. Flowers, and Joseph E. Igro. These parties are represented by the same counsel that represent petitioner, Village of Sebring, in the within Petition for Writ of Certiorari.

Petitioner is a governmental entity, not a private corporation. Accordingly, petitioner has no parent or subsidiary company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF AUTHORITIES ..... v

REPORTS OF OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 8

A. PROCEDURAL HISTORY ..... 8

B. STATEMENT OF THE FACTS ..... 10

1. HISTORY OF SEBRING WATER SERVICE TO EXTRATERRITORIAL USERS ..... 11

2. THE NEGOTIATION OF THE FmHA LOAN (1980-82) ..... 14

3. THE SALE OF THE FmHA LOAN (1987) AND RESOLUTION NO. 805-91 (1991) ... 17

ARGUMENT ..... 18

I. THE SIXTH CIRCUIT'S HOLDING REGARDING DISCOVERY IS INCONSISTENT WITH THE SUPREME COURT RULE THAT NO DISCOVERY SHOULD BE CONDUCTED DURING THE PENDENCY OF A DISPOSITIVE PLEADINGS MOTION BASED ON QUALIFIED IMMUNITY ..... 18

TABLE OF CONTENTS – Continued

Page

II. RESPONDENTS HAVE NO PRIVATE RIGHT OF ACTION UNDER 7 U.S.C. § 1926(b) AND 42 U.S.C. § 1983 ..... 21

III. A DISTRICT COURT MAY NOT GRANT JUDGMENT AS A MATTER OF LAW IN FAVOR OF PLAINTIFFS ON A PURPORTED STATE CLAIM WHERE THE COURTS OF THAT STATE HAVE UNAMBIGUOUSLY REJECTED THE EXISTENCE OF ANY SUCH STATE CLAIM AND WHERE PLAINTIFFS HAVE NO SUBSTANTIAL FEDERAL QUESTION ..... 28

IV. THE CLAIM OF PLAINTIFFS ROBERT AND SHARON ROUSE REGARDING SEWER SERVICE SHOULD NOT BE REMANDED FOR DISTRICT COURT DETERMINATION BECAUSE PLAINTIFFS PRESENTED NO EVIDENCE AT TRIAL TO SUPPORT THAT CLAIM..... 29

CONCLUSION ..... 30

# TABLE OF AUTHORITIES

Page

CASES

*Anderson v. Creighton*, 483 U.S. 635 (1987) ..... 18

*Ashbrook v. Block*, 917 F.2d 918 (6th Cir. 1990) ..... 24

*Brown v. Gardner*, 63 U.S.L.W. 4035 (U.S. Dec. 12, 1994) ..... 25, 27

*Buck v. United States Dep't of Agriculture*, 960 F.2d 603 (6th Cir. 1992) ..... 24

*City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 128 L.Ed.2d 302 (1994) ..... 25

*Cort v. Ash*, 422 U.S. 66 (1975) ..... 27

*CSL Utilities, Inc. v. Jennings Water, Inc.*, 16 F.3d 130 (7th Cir.), *cert. denied*, 115 S.Ct. 65, 130 L.Ed.2d 22 (1994) ..... 23

*Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) ..... 23

*Fairway Manor, Inc. v. Bd. of Comm'rs*, 36 Ohio St. 3d 85, 521 N.E.2d 818 (1988), *cert. denied*, 488 U.S. 1005 (1989) ..... 28

*Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211 (10th Cir. 1988) .... 24

*Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) ..... 21, 24

*Graham v. Goodcell*, 282 U.S. 409 (1931) ..... 25

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ..... 18, 21

*John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993) ..... 25

TABLE OF AUTHORITIES – Continued

Page

*Krug v. Sebring*, Case No. 92 C.A. 49 (Mahoning Cty. Ct. App. Dec. 30, 1993) ..... 28

*Landgraf v. USI Film Products*, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ..... 25

*Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) ..... 24

*Lundstrum v. Lyng*, 954 F.2d 1142 (6th Cir. 1991) ..... 24

*MCI Telecommunications Corp. v. American Tel. & Tel. Corp.*, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) ..... 25

*Mertens v. Hewitt Assocs.*, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) ..... 23

*Mitchell v. Forsyth*, 472 U.S. 511 (1985) ..... 18

*NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994) ..... 25

*Noroski v. Fallet*, 2 Ohio St. 2d 77, 442 N.E.2d 1298 (1982) ..... 29

*Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 1581 (1989) ..... 25

*Rice v. Wheeling Dollar Savings & Trust Co.*, 155 Ohio St. 391, 99 N.E.2d 301 (1951) ..... 29

*Siegert v. Gilley*, 500 U.S. ___, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) ..... 18

*Smith v. Dearborn Fin. Servs.*, 982 F.2d 976 (6th Cir. 1993) ..... 24

*State ex rel. Indian Hill Acres, Inc. v. Kellogg*, 149 Ohio St. 461, 79 N.E.2d 319 (1948) ..... 28

TABLE OF AUTHORITIES – Continued

Page

*State ex rel. McCann v. City of Defiance*, 167 Ohio St. 313, 148 N.E.2d 221 (1958) ..... 28

*Stiffler v. Lutheran Hosp.*, 965 F.2d 137 (7th Cir. 1992) ..... 24

*Suter v. Artist M.*, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) ..... 21, 24, 27

*West Va. Univ. Hosps., Inc. v. Casey*, 111 S.Ct. 1138, 113 L.Ed.2d 68, (1991) ..... 24

*Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) 21, 24

UNITED STATES CONSTITUTION

Art. I, § 8, cl. 1 ..... 21

Fourteenth Amendment ..... 8

STATUTES

7 U.S.C. § 1926 ..... 8, 23, 24, 25, 27

7 U.S.C. § 1926(a) ..... 25

7 U.S.C. § 1926(a)(1) ..... 1

7 U.S.C. § 1926(a)(7)(A) ..... 2, 23

7 U.S.C. § 1926(a)(13) ..... 2, 23

7 U.S.C. § 1926(a)(20) ..... 3, 25, 27

7 U.S.C. § 1926(b) ..... *passim*

7 U.S.C. § 1929a ..... 4

7 U.S.C. § 1929a(e) ..... 3, 26

7 U.S.C. § 1929a, note ..... 26

TABLE OF AUTHORITIES – Continued

Page

7 U.S.C. § 1989 ..... 5, 24

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1331 ..... 8

28 U.S.C. § 1343 ..... 8

28 U.S.C. § 1346 ..... 8

42 U.S.C. § 1983 ..... *passim*

Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 ..... 5, 27

Joint Resolution of Oct. 30, 1986, Pub. L. No. 99-591, § 381(a), 100 Stat. 3341 ..... 5

Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 1001, 100 Stat. 1874 ..... 4, 17, 26

REGULATIONS

7 C.F.R. § 1942.1 ..... 5, 26

7 C.F.R. § 1942.17(n)(2) ..... 6, 25

RULES

Fed. R. Civ. P. 30(a) ..... 19

Fed. R. Civ. P. 50(a) ..... 10

Fed. R. Civ. P. 50(b) ..... 10

Supreme Court Rule 10.1(a) ..... 29, 30

TABLE OF AUTHORITIES – Continued

Page

LEGISLATION OF THE MUNICIPALITY OF SEBRING

Loan Resolution 575-81 ..... 6, 17, 26, 27, 29

Ordinance No. 1477-90..... 8, 12, 13, 25

Ordinance No. 1481-90..... 8, 13

Resolution No. 805-91 ..... 8

*TO THE HONORABLE SUPREME COURT:*

Petitioner, Village of Sebring (sometimes referred to hereinafter as "Sebring"), hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

## REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App., *infra*, 1a-31a) is reported at 36 F.3d 517. The Order of the Sixth Circuit Court of Appeals denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (App., *infra*, 32a-33a) is not reported. The relevant memorandum opinions, orders, and judgment entries of the United States District Court for the Northern District of Ohio (App., *infra*, 34a-113a) are not reported.

## JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit (App., *infra*, 1a-31a) was entered on September 29, 1994. The Sixth Circuit denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc in an Order filed December 29, 1994 (App., *infra*, 32a-33a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, *inter alia*, a loan by the Farmers Home Administration ("FmHA") of the United States Department of Agriculture to the Village of Sebring in the early 1980s. At the time of that FmHA loan, 7 U.S.C. § 1926(a)(1) read, in pertinent part, as follows:

> (1) The Secretary is also authorized to make or insure loans to associations, including corporations not operated for profit, Indian

> tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farm tenants, farm laborers, and other rural residents and to furnish financial assistance or other aid in planning projects for such purposes.

Except for the addition of the language "rural businesses," after "farm laborers," on November 28, 1990, the foregoing language has remained unchanged from August 30, 1972 to the present.

Since October 13, 1980, 7 U.S.C. § 1926(a)(7)(A) has provided as follows:

> (7) As used in this title, the terms "rural" and "rural area" shall not include any area in any city or town which has a population in excess of ten thousand inhabitants, except that (A) for the purpose of loans for essential community facilities under subsection (a)(1) of this section, the terms "rural" and "rural area" may include any area in any city or town that has a population not in excess of twenty thousand inhabitants; . . . .

Since November 30, 1972, 7 U.S.C. § 1926(a)(13) has provided, in pertinent part, as follows:

> (13) In the making of loans . . . for community . . . water facilities under paragraph[ ] (1) . . . of this subsection the Secretary shall accord highest priority to the application of any municipality or other public agency . . . in a rural community having a population not in excess of five thousand five hundred [5,500] and which, in the case of water facility loans, has a

> community water supply system, where the Secretary determines that due to unanticipated diminution or deterioration of its water supply, immediate action is needed . . . .

Since November 28, 1990, 7 U.S.C. § 1926(a)(20) has provided: "In making or insuring loans or making grants under this subsection, the Secretary may not condition approval of such loans or grants upon any requirement, condition or certification other than those specified under this title."

Since 1961, 7 U.S.C. § 1926(b) has provided as follows:

> (b) **Curtailment or limitation of service prohibited.** The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of said loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1929a(e), as amended October 18, 1986, provides as follows:

> **(e) Notes and security as part of Insurance Fund; collection and sale of notes; deposit of net proceeds in Insurance Fund.** Notes and security acquired by the Secretary in connection with rural development loans made, guaranteed, or insured under this title or transferred by subsection (b) of this section shall become a part of the Insurance Fund. Notes and other obligations may be held in the Insurance Fund and collected in accordance with their terms or may be sold by the Secretary with or without agreements for insurance thereof at the balance

> due thereon, or on such other basis as the Secretary may determine from time to time, including sale on a nonrecourse basis. The Secretary and any subsequent purchaser of such notes or other obligations sold by the Secretary on a nonrecourse basis shall be relieved of any responsibilities that might have been imposed had the borrower remained indebted to the Secretary. All net proceeds from such collections, including sales of notes or property, shall be deposited in and become a part of the Insurance Fund.

An uncodified note to 7 U.S.C. § 1929a, provides in pertinent part:

> (a) Sales required. The Secretary of Agriculture, under such terms as the Secretary may prescribe, shall sell notes and other obligations held in the Rural Development Insurance Fund established under section 309A of the Consolidated Farm and Rural Development Act [7 U.S.C. § 1929a] . . . .
>
> (c) Contract provisions. Consistent with section 309A(e) of the Consolidated Farm and Rural Development Act [7 U.S.C. § 1929a], as amended by subsection (b), any sale of notes or other obligations, as described in subsection (a), shall not alter the terms specified in the note or other obligation, except that, on sale, a note or other obligation shall not be subject to the provisions of section 333(c) of the Consolidated Farm and Rural Development Act [7 U.S.C. § 1983(c)].
>
> . . . .
>
> (g) Applicability of prohibition on curtailment or limitation of service. Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. § 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section.

Subsections (a) and (c) of the foregoing were approved October 21, 1986. Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 1001, 100 Stat. 1874,

1874-1875.[1] Subsection (g) was approved January 6, 1988. Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568, 1714.

Since 1961, 7 U.S.C. § 1989 has provided as follows:

> The Secretary is authorized to make rules and regulations, prescribe the terms and conditions for making or insuring loans, security instruments and agreements, except as otherwise specified herein, and make such delegations of authority as he deems necessary to carry out this title.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

7 C.F.R. § 1942.1, as amended November 13, 1989, provided, in pertinent part, as follows:

> **§ 1942.1 General**
>
> (a) This subpart outlines the policies and procedures for making and processing insured loans for community facilities . . . .
>
> (c) Loans sold without insurance by FmHA to the private sector will be serviced in the private sector and will not be serviced under this subpart. The provisions of this subpart are

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[1] The October 30, 1986 Joint Resolution making continuing appropriations for the fiscal year 1987 effected a slight change in the above-quoted language of subsection (a): The word "shall" was moved in the position of the fourth word of the provision, after "The Secretary of Agriculture" and immediately before the first comma. Pub. L. No. 99-591, § 381(a), 100 Stat. 3341, 3341-372.

> not applicable to such loans. Future changes to this subpart will not be made applicable to such loans.

7 C.F.R. § 1942.17(n)(2), as amended April 11, 1990, provided, in pertinent part, as follows:

> (2) Loan resolutions. Loan resolutions will be adopted by . . . public . . . bodies using Form FmHA 1942-47, "Loan Resolution (Public Bodies)," . . . . These resolutions supplement other provisions in this subpart. The applicant will agree: . . .
>
> (vii) To provide adequate service to all persons within the service area who can feasibly and legally be served and to obtain FmHA's concurrence prior to refusing new or adequate services to such persons. Upon failure of the applicant to provide services which are feasible and legal, such person shall have a direct right of action against the applicant organization.

Loan Resolution 575-81[2], adopted September 14, 1981 by the Sebring Council, provided, in pertinent part, as follows:

> A RESOLUTION OF THE COUNCIL OF THE CITY OF SEBRING AUTHORIZING AND PROVIDING FOR THE INCURRENCE OF INDEBTEDNESS FOR THE PURPOSE OF PROVIDING A PORTION OF THE COST OF ACQUIRING, CONSTRUCTING, ENLARGING, IMPROVING, AND/OR EXTENDING ITS WATERWORKS SYSTEM FACILITY TO SERVE AN AREA LAWFULLY WITHIN ITS JURISDICTION TO SERVE.
>
> WHEREAS, it is necessary for the COUNCIL, (herein after called association) to raise a portion of the cost of such undertaking by issuance

---

[2] This was a printed form resolution provided by the FmHA. All matter in the following excerpt is from the printed form resolution except for the underlined language, which was typed in on blanks on the form.

bonds in the principal amount of Three Million Five Hundred Seventy-Five Thousand Dollars (3,575,000.00) pursuant to the provisions of Article XVIII, Section 12 of the Ohio Constitution.

WHEREAS, the association intends to obtain assistance from the Farmers Home Administration, United States Department of Agriculture, (herein called the Government) acting under the provisions of the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) in the planning, financing, and supervision of such undertaking and to purchasing of bonds lawfully issued, in the event that no other acceptable purchaser for such bonds is found by the association:

NOW, THEREFORE, in consideration of the premises the association hereby resolves:

1. To have prepared on its behalf and to adopt an ordinance or resolution for the issuance of its bonds and containing such items and in such forms as are required by STATE statutes and as are agreeable and acceptable to the Government.

2. To refinance the unpaid balance, in whole or in part, of its bonds upon the request of the Government if at any time it shall appear to the Government that the association is able to refinance its bonds by obtaining a loan for such purposes from responsible cooperative or private sources at reasonable rates and terms for loans for similar purposes and periods of time as required by section 333(c) of said Consolidated Farm and Rural Development Act (7 U.S.C. 1983(c)). . . .

9. To comply with all applicable State and Federal laws and regulations . . . .

14. To provide adequate service to all persons within the service area who can feasibly and legally be served and to obtain FmHA's concurrence prior to refusing new or adequate

> services to such persons. Upon failure to provide services which are feasible and legal, such person shall have a direct right of action against the association or public body.
>
> The provisions hereof and the provisions of all instruments incident to the making or insuring of the loan, unless otherwise specifically provided by the terms of such instruments, shall be binding upon the association as long as the bonds are held or insured by the Government. . . .

Ordinance No. 1477-90, adopted November 26, 1990 by the Sebring Council, is set forth in the Appendix, *infra*, at 114a-118a.

Ordinance No. 1481-90, adopted December 27, 1990 by the Sebring Council, is set forth in the Appendix, *infra*, at 119a-125a.

Resolution No. 805-91, adopted April 22, 1991 by the Sebring Council, is set forth in the Appendix, *infra*, at 126a-128a.

## STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Respondents filed this action in the United States District Court for the Northern District of Ohio, Eastern Division. Respondents alleged, *inter alia*, that petitioner violated respondents' rights under 7 U.S.C. § 1926 and 42 U.S.C. § 1983. Respondents' Complaint also alleged claims under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Respondents' constitutional allegations are not a subject of the instant Petition for Writ of Certiorari, because the Sixth Circuit Court of Appeals did not reach the constitutional issues. In their Complaint, respondents predicated federal subject matter jurisdiction on 28 U.S.C. §§ 1331, 1343, and 1346.

Respondents sued the Village of Sebring and various Sebring officials in their individual and official capacities.

As will be explained in detail in a subsequent section of this petition, the District Court initially stayed discovery for many months and thereafter denied several motions by petitioner regarding discovery. (App., *infra*, 34a-42a, 61a-64a). On July 2, 1992, the District Court granted the individual capacity defendants' motion for judgment on the pleadings on the ground of qualified immunity. (App., *infra*, 43a-60a). On August 14, 1992, the District Court denied both petitioner's motion for judgment on the pleadings and respondents' motion for summary judgment. (App., *infra*, 65a-66a). On September 29, 1992, after a jury trial lasting several days, the District Court directed a verdict for the respondents on the issue of liability, and submitted the issue of damages to the jury for determination. (App., *infra*, 67). The jury awarded a total of $55,600.00 against petitioner. (*Id.*).

On December 29, 1992, the District Court filed a lengthy Memorandum Opinion supporting its directed verdict and addressing attorneys' fees issues. (App., *infra*, 68a-107a). On January 12, 1993, the District Court filed a Judgment Entry incorporating the directed verdict on liability, the jury verdict on damages, an award of attorneys' fees, and a permanent injunction. (App., *infra*, 108a-110a). On March 10, 1993, the District Court filed an Order overruling petitioner's motions to alter or amend the judgment, for judgment as a matter of law, and for new trial, as well as respondents' motion for relief from judgment. (App., *infra*, 111a-113a).

Petitioner appealed, and respondents cross-appealed. The Sixth Circuit Court of Appeals affirmed, in pertinent part, the District Court's directed verdict in favor of respondents, the District Court's denial of petitioner's posttrial motions, and the District Court's rulings on discovery issues. (App., *infra*, at 31a). In response to respondents' cross-appeal, the Sixth Circuit "remand[ed] the issue of whether the injunction should encompass sewer service for initial consideration by the lower court." (*Id.*).

In an Order filed December 29, 1994, the Sixth Circuit denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. (App., *infra*, 32a-33a). This was a form Order that did not specifically address the issues in the petition. (*Id.*).

## B. STATEMENT OF THE FACTS

Although the Sixth Circuit Court of Appeals correctly stated in its opinion that, in evaluating a motion for judgment as a matter of law (Fed. R. Civ. P. 50(a), (b)), the Court of Appeals, like the District Court, "must view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences" (App., *infra*, at 10a), neither the Sixth Circuit nor the District Court actually applied that standard in the instant case. The District Court itself heard all the evidence, and all relevant and admissible evidence was made part of the record on appeal. However, both the District Court and the Sixth Circuit ignored significantly probative evidence that was admitted at trial, made part of the record on appeal, and cited and discussed in petitioner's appellate briefs. Moreover, both the District Court and the Court of Appeals construed any ambiguity in the evidence in favor of the respondents. (See, for example, the Sixth Circuit's opinion at page 7a, n.1 of the Appendix, where the Court consciously chose to give credibility to testimony by a plaintiff that the same plaintiff directly contradicted at another point in his testimony.) Although such construction of the evidence in favor of respondents might have been appropriate had the District Court been the trier of fact, it was totally inappropriate in the context of a directed verdict for respondents in a jury trial.

The following statement of the facts is based on admissible and significantly probative evidence of record. Although the space limitations of a petition for certiorari do not permit a detailed explanation of the evidence presented at trial, the following account summarizes the

portion of that evidence that is most relevant to the instant petition.

### 1. HISTORY OF SEBRING WATER SERVICE TO EXTRATERRITORIAL USERS

Beginning in 1959 (or earlier), the Village of Sebring had a policy whereby Sebring water service would be extended to properties outside the corporation limits ("extraterritorial users") only if the extraterritorial users agreed to honor and/or participate in annexation proceedings if and when annexation of their properties became feasible. Pursuant to this policy, at least thirty-seven (37) written water service-annexation agreements were executed, and most of these agreements were officially recorded with the county recorder.

The typical agreement required the extraterritorial user "to honor and/or participate in any annexing [*sic*] proceedings started by either residents outside the corporate limits of the Village of Sebring, Ohio, or by the Village of Sebring, Ohio." Moreover, the extraterritorial users who signed these agreements further agreed "that this Agreement shall become binding upon their heirs and assigns" and "that in the event this Agreement is not kept by [the signing extraterritorial users, typically a couple], their heirs and assigns, then the Village of Sebring, Ohio shall have the right to interrupt and/or stop said 'tap on' on water without notice to [the signing extraterritorial users] their successors and assigns." Such water service-annexation agreements with various extraterritorial users were executed in the years 1959, 1960, 1961, 1962, 1963, 1965, 1967, 1968, 1969, and 1981. No annexation agreements were signed in the early 1970s because extraterritorial residents desiring water at that time immediately annexed into Sebring rather than sign an agreement to annex in the future. In the middle and late 1970s, Sebring did not permit new water taps or water line extensions because the condition of the water

plant and water storage facility made the availability of water questionable.

Sebring's waterworks system was improved in the early 1980s. Two water service-annexation agreements were executed by extraterritorial users in 1981. Although no written annexation agreements can be found from 1982 to 1990, the official policy did not change; it may be that Sebring ministerial employees did not strictly enforce the policy during these years. In any event, a maximum of only ten or twelve new extraterritorial users failed to sign water service-annexation agreements during this time period, and several of these may not in fact have been new customers or may have signed agreements that cannot be located.

On November 26, 1990, the Sebring Council adopted Ordinance No. 1477-90. (App., *infra*, 114a-118a). Ordinance No. 1477-90 contained, *inter alia*, provisions whereby current extraterritorial users of Sebring water service were given 180 days to petition the Mahoning County Commissioners to be annexed into Sebring in accordance with law. (*Id.* at 115a-116a). Current extraterritorial users residing in the area of the Maple Ridge Water Association (which had previously entered into water service contracts, expiring April 11, 1972, with Sebring) would continue receiving water service from Sebring so long as the Maple Ridge Water Association exercised good faith in commencing an annexation petition with the Mahoning County Commissioners within 180 days after the effective date of the ordinance. (*Id.* at 116a-117a). Current extraterritorial users whose properties could not be legally annexed into Sebring would have been required to enter into a written agreement with Sebring to specify the terms, conditions, and covenants of service. (*Id.* at 117a). Ordinance No. 1477-90 never went into effect because a referendum petition was timely filed on December 26, 1990, and the ordinance was defeated in the November 5, 1991 referendum election by a vote of 574 to 520.

Mayor J. Michael Pinkerton ("Pinkerton") testified at trial that Ordinance No. 1477-90 was prompted by the question of how Sebring was going to pay for solutions to the problem of water line deterioration outside the Sebring corporation limits. Mayor Pinkerton believed there was a serious problem, legally and otherwise, for Sebring to use its own citizens' tax dollars to finance improvements and repairs to the extraterritorial water lines. As explained above, however, Ordinance No. 1477-90 never went into effect.

On December 27, 1990, the Sebring Council passed Ordinance No. 1481-90, which added administrative details for the implementation of Ordinance No. 1477-90. (App., *infra*, 119a). As a result of the referendum, Ordinance No. 1481-90 likewise never went into effect.

After the filing of the referendum petition on December 21, 1990, Sebring officials understood that they could not legally enforce either Ordinance No. 1477-90 or Ordinance No. 1481-90 unless and until a majority of the voters approved Ordinance No. 1477-90 in the November 5, 1991 election. Accordingly, instead of implementing the new policies embodied in Ordinance No. 1477-90, Sebring officials applied the pre-existing and historic Sebring policy, discussed above, of requiring water service-annexation agreements (or, if the extraterritorial property was adjacent to Sebring, signature of the property owner on an annexation petition) as a precondition of *new* extraterritorial water service. However, a novel situation presented itself in the time period after the filing of the referendum petition: the respondents confronted Sebring officials with an issue, never raised before, of whether *purchasers* of extraterritorial properties that already had a physical water tap for Sebring water service were required to sign a water service-annexation agreement as a precondition of obtaining Sebring water service. Sebring officials applied their understanding of the historic policy by answering that precise question in the affirmative.

Space does not permit a detailed discussion of the many particular circumstances of the various respondents. However, the evidence admitted at trial established that the plaintiffs who recovered monetary damages were all involved in fact situations in which the issue was *transfer* of water service to a new owner or the *establishment of new water service*, as distinguished from continuation of water service to an existing user.[3] Contrary to the factual premise of the Sixth Circuit (App., *infra*, at 6a, 13a n.5), no evidence exists that Sebring ever enforced any policy of requiring annexation as a condition of *continuing* water service to *existing* users; the ordinance that had incorporated this principle never went into effect, as it was subjected to, and defeated in, a referendum. Similarly, the statement by the Sixth Circuit that "many of the present plaintiffs enjoy contracts with Sebring for [water] service" (*Id.* at 13a n.5) is simply not supported in the record.

### 2. THE NEGOTIATION OF THE FmHA LOAN (1980-82)

By 1976, the Sebring waterworks system was servicing approximately 4,900 residents of Sebring as well as residents of the Village of Beloit and certain Smith Township residents. Beloit and Smith Township are, like Sebring, in Mahoning County. Sebring was also servicing individual residences and properties in Knox Township, located in Columbiana County, Ohio.

By the middle and late 1970s, Sebring's ability to provide adequate potable water was in jeopardy due to the age of the system and its limited capacity; thus, beginning about the year 1976, Sebring began to plan to

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[3] The only other plaintiff who testified at trial was William Tuel, and the testimony regarding Tuel's situation does not provide significantly probative evidence supporting a factual conclusion that any actual threat existed to the continuation of Tuel's water service.

rebuild, enlarge, and expand its waterworks system. Funds to accomplish this project were ultimately obtained from the Farmers Home Administration ("FmHA") of the United States Department of Agriculture through a $3,575,000 loan. The project came to completion about 1983.

The loan eventually extended by FmHA to Sebring was much less than Sebring originally requested. On February 26, 1978, Sebring applied to the FmHA for a grant in the amount of $2,127,000 and a loan in the amount of $3,211,000. These funds were to be used for an upground 200 million gallon reservoir, replacement of approximately 72,600 feet of a 75-year-old distribution system, and expansion and modernization of the 50-year-old water treatment plant. FmHA denied all of the grant application. As a result of the denial of the grant application and a reduction in the loan amount, the 200 million gallon reservoir and the replacement of 72,600 feet of the 75-year-old distribution system were not part of the final project. Instead, the final project included an above-ground one million gallon finished water storage tank and a low-head dam reconstruction in the Mahoning River at the location of the treatment plant.

An essential element of the respondents' case is a map, found in the FmHA files, indicating an extraterritorial service area that includes the respondents' properties. However, respondents did not properly authenticate the map; Marvin Aylsworth ("Aylsworth"), the FmHA employee who purported to authenticate it, did not even see the map until he first received the Sebring application file in 1980, and by that time the map was not attached to any application. Aylsworth claimed the map was accompanied by a certification signed by Sebring and Sebring's engineer attesting that the lines indicated on the map were Sebring's service area, but neither Aylsworth nor respondents produced the alleged certification. Aylsworth did not even know when the map

was submitted to the FmHA. Despite respondents' objections that the map was not properly authenticated, the District Court admitted it into evidence.

The only evidence available suggests that the map was part of the January 26, 1978 application of Sebring for a substantial grant and a loan, an application that was *rejected* by the FmHA. Indeed, the map itself shows a "PROPOSED ELEVATED WATER TANK", "PROPOSED 12" PIPELINE", and "PROPOSED WATER LINE REPLACEMENT" in portions of the delineated service area that are *outside the Sebring corporation limits*. As observed above, the FmHA did not approve funding of these items. It follows that Sebring cannot be bound by the "service area" delineated in the map – a "service area" that was dependent on approval of Sebring's January 26, 1978 application and that was no longer operative once that application was rejected.

Furthermore, Aylsworth himself testified that the map was already in the FmHA file when he took over the file in 1980. However, the terms and conditions of the FmHA loan to Sebring were negotiated *after* – not before – Aylsworth took over the file. Aylsworth testified that he negotiated the terms and conditions of the FmHA-Sebring loan with City Manager Charles Tieche ("Tieche") and Mayor Pinkerton. Tieche did not become Sebring city manager until August 1, 1981 – years after the time that the January 26, 1978 application and the subject map were submitted to the FmHA. Pinkerton became Mayor and President of Council of Sebring on January 1, 1980.

Aylsworth did not recall discussing what "service area" meant with any Sebring official. Moreover, respondents presented no testimony that any FmHA official told any Sebring official that Sebring could not condition water service to extraterritorial users on annexation.

Mayor Pinkerton testified at length about his negotiations with Aylsworth. Pinkerton testified, *inter alia*, that Aylsworth never required Sebring to give up the annexation contracts that it had with extraterritorial users.

As part of the loan application process, the Sebring Council passed Loan Resolution 575-81 ("Loan Resolution") on September 14, 1981, and this Loan Resolution was signed by Mayor-President of Council Pinkerton on the same date. The Loan Resolution was an FmHA form. In paragraph 14 of the Loan Resolution, the Sebring Council resolved "[t]o provide adequate service to all persons within the *service area* who can *feasibly* and *legally* be served and to obtain FmHA's concurrence prior to refusing new or adequate services to such persons." (Emphasis added.) Aylsworth testified that he did not recall discussing the Loan Resolution with any Sebring official other than the clerk. Moreover, Aylsworth had no recollection of discussing the meaning of "service area" with any Sebring official. Mayor Pinkerton testified that he had understood the term "service area" in the Loan Resolution to mean only "the area I was responsible for", as distinguished from areas outside the Sebring corporation limits.

The December 28, 1982 Indenture of Mortgage, which included the text of the December 28, 1992 Bond Ordinance of Sebring, was, according to Aylsworth, "basically the final thing that [FmHA] get[s]" at the time of the closing of the FmHA loan. There is no reference in that document to "service area" or any similar term.

### 3. THE SALE OF THE FmHA LOAN (1987) AND RESOLUTION NO. 805-91 (1991)

On September 1, 1987, FmHA sold the Sebring loan to a private trust pursuant to the provisions of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874. Under the express terms of both the September 14, 1981 Loan Resolution[4] and the December 28, 1982 Indenture of Mortgage, this sale terminated

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[4] The Loan Resolution provided in pertinent part: "The provisions hereof and the provisions of all instruments incident to the making or insuring of the loan, unless otherwise specifically provided by the terms of such instruments, shall be

Sebring's obligations under the Loan Resolution, particularly paragraph 14 of the Loan Resolution. Accordingly, on April 22, 1991, the Sebring Council repealed the Loan Resolution. (App., *infra*, 126a-128a).

## ARGUMENT

### I. THE SIXTH CIRCUIT'S HOLDING REGARDING DISCOVERY IS INCONSISTENT WITH THE SUPREME COURT RULE THAT NO DISCOVERY SHOULD BE CONDUCTED DURING THE PENDENCY OF A DISPOSITIVE PLEADINGS MOTION BASED ON QUALIFIED IMMUNITY.

This Court has held that *no discovery* is to be conducted during the pendency of a motion to dismiss based on federal qualified immunity. "Until this threshold immunity question is resolved, *discovery should not be allowed.*" *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added); *accord Siegert v. Gilley*, 500 U.S. ___, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal *before the commencement of discovery.*" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added); *accord Anderson v. Creighton*, 483 U.S. 635, 647 n.6 (1987).

The qualified immunity and legislative immunity motion brought by the individual capacity municipal defendants in the case at bar was a motion for judgment on the pleadings – *not* a motion for summary judgment. The District Court recognized that the principles applicable to a motion to dismiss governed its ruling on this motion for judgment on the pleadings, and the District Court made no attempt to convert the individual capacity municipal defendants' motion for judgment on the pleadings to a motion for summary judgment. (App., *infra*, at

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binding upon the association *as long as the bonds are held or insured by the Government.*" (Emphasis added.)

47a-55a, 58a, 60a). However, the Sixth Circuit inaccurately referred to the immunity motion as a motion for summary judgment. (*Id.* at 22a). The Sixth Circuit properly affirmed the grant of the individual capacity municipal defendants' motion for judgment on the pleadings based on qualified immunity. (*Id.* at 23a-25a). However, the Sixth Circuit also accepted the District Court's position (*Id.* at 39a-41a, 62a-64a) that the stay of discovery pending the District Court's ruling on the immunity motion did not apply to any parties other than the individual capacity municipal defendants, and that Sebring should therefore have proceeded with discovery during the period of such stay. (*Id.* at 22a).

The claims against defendant Sebring remained after the July 2, 1992 Memorandum Opinion and Judgment Entry dismissing the claims against the individual capacity municipal defendants on the basis of qualified immunity. (App., *infra*, 43a-60a). Nevertheless, the District Court refused to extend its June 1, 1992 discovery cutoff to allow Sebring to take depositions of any of the original sixteen plaintiffs or their many nonparty witnesses. (*Id.* at 39a-42a, 62a- 64a).[5] Since the District Court had earlier stayed discovery (pending court-ordered settlement negotiations) from November 14, 1991 until March 5, 1992 (*Id.* at 34a-38a), Sebring was effectively denied its right under Fed. R. Civ. P. 30(a) to take depositions of the original plaintiffs and their nonparty witnesses. At trial, the District Court granted judgment as a matter of law against Sebring, permitted the jury to assess monetary damages, and granted injunctive relief against Sebring following the testimony of five plaintiffs and eight of plaintiffs' nonparty witnesses whom Sebring had never had the opportunity to depose.

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[5] The District Court permitted only the depositions of two new party plaintiffs (Jeffrey and Nancy Stuchell) who were added to the case twelve (12) days before trial.

The Sixth Circuit's position that Sebring should have proceeded with discovery during the pendency of the immunity motion (App., *infra*, 22a) conflicts with the well-established Supreme Court authority cited above that *no discovery may occur during the pendency of a pleadings motion based on immunity*. In the present case, the individual capacity municipal defendants and defendant Sebring were represented by the same counsel, *except* that one of the individual capacity municipal defendants was additionally represented by separate counsel, Attorney William B. Shetler ("Shetler"). Mr. Shetler represented only defendant James V. Daniels in his individual capacity; Mr. Shetler did not represent defendant Sebring or any of the other defendants in any capacity. The Court can take judicial notice of the fact that in some 42 U.S.C. § 1983 cases a conflict of interest exists between the defendant political subdivision and one or more of its public officials (or police officers) sued in their individual capacities such that each must have totally separate counsel. The rule adopted by the District Court – and subsequently by the Sixth Circuit – would have required the attorneys for defendant Sebring to have proceeded with depositions of the plaintiffs and their principal witnesses during the pendency of the immunity motions. Mr. Shetler would then have been faced with the dilemma of allowing those depositions to go forward without his participation or of attending them. If such depositions had gone forward without his presence and if the District Court had subsequently denied his client's motion for judgment on the pleadings on the basis of qualified and legislative immunity, his client would then have had every right to insist upon the re-deposition, with Mr. Shetler's presence, of each and every plaintiff and non-party witness who had theretofore been deposed. The implications of this procedure for judicial economy are staggering. More importantly, Mr. Shetler could not, consistent with his professional obligation, have allowed the depositions to go forward in his absence, because not to

attend such depositions might have entailed serious consequences for his client. Accordingly, the rule adopted by the District Court and the Sixth Circuit totally eviscerates the rule pronounced by this Court that "[u]ntil this threshold immunity question is resolved, *discovery should not be allowed.*" *Harlow*, 457 U.S. at 818 (emphasis added). The Sixth Circuit's position is in conflict with both the letter and the spirit of the well-established Supreme Court rule. In order to vindicate the qualified immunity principles expressed in its previous opinions, this Court should review the published decision of the Sixth Circuit Court of Appeals.

## II. RESPONDENTS HAVE NO PRIVATE RIGHT OF ACTION UNDER 7 U.S.C. § 1926(b) AND 42 U.S.C. § 1983.

The Sixth Circuit held that respondents had a private right of action under 7 U.S.C. § 1926(b) and 42 U.S.C. § 1983. (App., *infra*, at 15a-21a).

This Court has repeatedly held that "[s]ection 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law." *Suter v. Artist M.*, 112 S.Ct. 1360, 1367, 118 L.Ed.2d 1, 12 (1992) (some internal quotation marks omitted); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). In cases (such as the case at bar) involving the spending power (Art. I, § 8, cl. 1 of the Constitution), a plaintiff has no right of action under § 1983 (or otherwise) unless Congress "unambiguously" confers such right upon the plaintiff. *Suter*, 112 S.Ct. at 1367, 1370, 118 L.Ed.2d at 12, 15-16. As demonstrated below, Congress did not unambiguously confer any such right on the respondents.

The text of 7 U.S.C. § 1926(b) provides as follows:

> (b) Curtailment or limitation of service prohibited. *The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such*

> *association within the boundaries of any municipal corporation* or other public body, or by the granting of any private franchise for similar service within such area during the term of said loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

(Emphasis added.)

It is undisputed that respondents all reside outside the municipal corporation of Sebring. No evidence was presented at trial (or elsewhere) that any of the eighteen plaintiffs, other than Mark and Carla Wayne, had a contract for water service with Sebring. The contract between the Waynes and Sebring provided that it would remain in effect until "withdrawn by the [Waynes] or service terminated by the Municipality." In other words, the only contract for water service that was possessed by any of the respondents was a contract that was terminable at the will of either the Waynes or Sebring. Furthermore, Sebring never enforced a referended ordinance that would have required existing nonresidential users to annex as a condition of continuation of water service; the evidence establishes only that Sebring required annexation agreements with regard to new or transferred nonresidential water service.

Therefore, the question is whether persons residing outside the corporation limits of Sebring have a private right of action pursuant to 7 U.S.C. § 1926(b) and 42 U.S.C. § 1983 against Sebring as a result of Sebring's practice of conditioning new or transferred nonresidential water service on execution of an annexation agreement. The language of § 1926(b) plainly does *not* extend to persons in the positions of respondents: The "inclusion" of respondents "within the boundaries" of Sebring would *not* "curtail[ ] or limit[ ]" Sebring water service within the meaning of that section. Rather, the annexation

of respondents would *guarantee* that respondents would always be serviced by the Sebring water system; absent annexation, respondents could disconnect from Sebring water service at will, as many similarly situated nonresidential customers have in fact done. The reason the plain language of § 1926(b) does not extend to respondents is because *annexation to a municipality receiving a Farmer's Home Administration ("FmHA") loan promotes that statute's objective "to protect the customer base of rural water associations" receiving FmHA loans. CSL Utilities, Inc. v. Jennings Water, Inc.*, 16 F.3d 130, 133 (7th Cir.), *cert. denied*, 115 S.Ct. 65, 130 L.Ed.2d 22 (1994). Absent annexation, respondents and other similarly situated persons outside the Sebring corporation limits could legally either drill their own wells or obtain water from the Maple Ridge Water Association, which pre-existed the FmHA loan. *CSL Utilities*, 16 F.3d at 134-38.

None of the cases cited by respondents, the District Court, or the Sixth Circuit held or ruled that § 1926(b) prohibits *a municipality receiving an FmHA loan* from conditioning extraterritorial water service upon annexation. The provisions of 7 U.S.C. § 1926 cannot sustain the reading imposed on them by the respondents, the District Court, and the Sixth Circuit – in part because the statutory definition of "rural" includes small towns such as Sebring. 7 U.S.C. § 1926(a)(7)(A), (a)(13).[6] The reading of § 1926 by the Sixth Circuit is inconsistent with the "plain language" rule of statutory construction. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197-98 (1976). Federal courts do *not* have authority to "revise the text of the statute." *Mertens v. Hewitt Assocs.*, 113 S.Ct. 2063, 2070, 124 L.Ed.2d 161 (1993). A court may not enlarge the meaning of a

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[6] All legislation cited herein is set forth (or referenced to the Appendix) in the section "Constitutional and Statutory Provisions Involved", *supra*. In connection with the above-cited statutes, it should be observed that the parties stipulated that Sebring has had a population of about 5,000 residents for several decades.

statute "so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *West Va. Univ. Hosps., Inc. v. Casey*, 111 S.Ct. 1138, 1148, 113 L.Ed.2d 68, 85 (1991). "It is a well-established principle of statutory construction that silence is not an invitation to embark on a path of judicial lawmaking." *Stiffler v. Lutheran Hosp.*, 965 F.2d 137, 140 (7th Cir. 1992). Moreover, the fact that § 1926(b) prohibits a municipality not receiving an FmHA loan from annexing an area serviced by a water association receiving FmHA funds, *Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211, 1214-15, 1217 (10th Cir. 1988), while *not* specifically prohibiting a municipality receiving an FmHA loan from annexing extraterritorial areas being serviced by the municipality's water system, means that the latter situation does not fall within the statutory prohibition. *Expressio unius est exclusio alterius. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S.Ct. 1160, 1163, 122 L.Ed.2d 517 (1993).

Because, as demonstrated above, 7 U.S.C. § 1926(b) was not unambiguously intended to benefit the respondents, the respondents have no right of action under 42 U.S.C. § 1983. *Suter*, 112 S.Ct. at 1366-70, 118 L.Ed.2d at 10-16; *Wilder*, 496 U.S. at 509; *Golden State*, 493 U.S. at 106 (1989). Nor does 7 U.S.C. § 1989, which authorizes the Department of Agriculture to promulgate regulations implementing 7 U.S.C. § 1926, create a private right of action. *Buck v. United States Dep't of Agriculture*, 960 F.2d 603, 609 (6th Cir. 1992); *Lundstrum v. Lyng*, 954 F.2d 1142, 1144-47 (6th Cir. 1991); *Ashbrook v. Block*, 917 F.2d 918, 925-26 (6th Cir. 1990). Indeed, as the Sixth Circuit aptly observed on another occasion, "federal regulations cannot themselves create a cause of action; that is the function of the legislature. . . . A grant of federal rulemaking power is not authority to create federal jurisdiction. That authority lies solely with Congress." *Smith v. Dearborn Fin. Servs.*, 982 F.2d 976, 979 (6th Cir. 1993).

Thus, FmHA's attempt to create its own private right of action in respondents by means of 7 C.F.R. § 1942.17(n)(2) and the mandatory form Loan Resolution (see Statement of Facts, *supra*) is not authorized by statute; it is, in fact, specifically prohibited by 7 U.S.C. § 1926(a)(20), which provides: "In making or insuring loans or making grants under this subsection, *the Secretary may not condition approval of such loans or grants upon any requirement, condition or certification other than those specified under this title.*" (Emphasis added.) This clear and express prohibition on administrative expansion of rights under § 1926(a) demonstrates that Congress did not intend to create any rights other than those specified in the Act itself. This statutory amendment was enacted two days after Sebring adopted Ordinance No. 1477-90 (which never went into effect) and weeks before the actions (if any) of which respondents complain. The fact that § 1926(a)(20) was enacted years after the FmHA loan to Sebring does not make it inapplicable to that loan. As a curative statute, it is not unconstitutionally retroactive legislation. *Graham v. Goodcell*, 282 U.S. 409, 429-30 (1931); *see also Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229 (1994). Moreover, under the foregoing legal and factual circumstances, no deference should be given to FmHA's interpretation of 7 U.S.C. § 1926. "[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear . . . . " *MCI Telecommunications Corp. v. American Tel. & Tel. Corp.*, 114 S.Ct. 2223, 2231, 129 L.Ed.2d 182 (1994); *accord Brown v. Gardner*, 63 U.S.L.W. 4035, 4037 (U.S. Dec. 12, 1994); *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994); *City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1594, 128 L.Ed.2d 302 (1994); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 114 S.Ct. 517, 531, 126 L.Ed.2d 524 (1993); *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989). Therefore, respondents have no right of action under 7 U.S.C. § 1926 and 42 U.S.C. § 1983.

Furthermore, even assuming, *arguendo*, that the Department of Agriculture had constitutional authority to create a private right of action where Congress did not unambiguously create such a right, the right the FmHA purported to create was limited by the express proviso, both in the FmHA regulations and in the form Loan Resolution, that Sebring was no longer bound to such nonfinancial terms once the loan was sold to the private sector. 7 C.F.R. § 1942.1; Loan Resolution 575-81, last paragraph.[7] It is undisputed that FmHA sold the Sebring loan to the private sector in 1987. Accordingly, paragraph 14 of Loan Resolution 575-81 no longer applied, and Sebring expressly repealed Loan Resolution 575-81 on April 22, 1991. In attempt to overcome the plain meaning of 7 C.F.R. § 1942.1 and the last paragraph of Loan Resolution 575-81, the Sixth Circuit cited a note to 7 U.S.C. § 1929a: "[A]ny sale of notes or other obligations, as described in subsection (a), shall not alter the terms specified in the note or other obligation . . . . " Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 1001, 100 Stat. 1874, 1874-1875. (App., *infra*, at 14a). However, the language "notes or other obligations" in this provision, as well as the language "notes and other obligations held in the Rural Development Insurance Fund" in subsection (a) to which it refers, plainly means documents constituting *financial* obligations, such as promissory notes, bonds, indentures, and so forth. This conclusion also necessarily follows from 7 U.S.C. § 1929a(e), in which the language "[n]otes and security" is used interchangeably with the language "[n]otes and other obligations"; that provision provides, in pertinent part, that "[n]otes and other obligations may be held in the Insurance Fund and collected in accordance with their terms or may be sold by the Secretary . . . . " Such

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[7] Loan Resolution 575-81 and the regulations cited herein are set forth in the section "Constitutional and Statutory Provisions Involved", *supra*.

language cannot reasonably be construed to extend to the nonfinancial provisions of Loan Resolution 575-81. The statutory language *cannot* be read "any sale of a Loan Resolution" or "a Loan Resolution may be held in the Insurance Fund and collected in accordance with its terms or may be sold by the Secretary"; such construction would be facially absurd, as a municipal Loan Resolution clearly cannot be "sold" or "collected", let alone "held in the Insurance Fund . . . . " As the Court has recently held, "[a]mbiguity is a creature not of definitional possibilities but of statutory context . . . . " *Brown*, 63 U.S.L.W. at 4036.

The foregoing analysis is confirmed by the fact that on January 6, 1988 (after the Sebring loan was sold by FmHA to the private sector), the President approved an Act of Congress containing the following provision: "Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. § 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section." Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568, 1714 (codified at 7 U.S.C. § 1926a note). As demonstrated above, 7 U.S.C. § 1926(b) does not create a private right of action in the respondents. However, the fact that Congress knew how to create, in an explicit manner, an exception to the normal procedure of nontransferability of nonfinancial obligations, establishes that Congress did not intend the nonfinancial provisions at issue in this case to remain after the sale of the Sebring loan to the private sector. *Brown*, 63 U.S.L.W. at 4037. This is confirmed by the enactment on November 28, 1990 of 7 U.S.C. § 1926(a)(20): "In making or insuring loans or making grants under this subsection, *the Secretary may not condition approval of such loans or grants upon any requirement, condition or certification other than those specified under this title.*" (Emphasis added.)

Accordingly, respondents have no right of action under 7 U.S.C. § 1926 and 42 U.S.C. § 1983. Similarly, respondents have no direct right of action under 7 U.S.C. § 1926. *Suter*, 112 S.Ct. at 1370, 118 L.Ed.2d at 16; *Cort v. Ash*, 422 U.S. 66 (1975). The Court should issue a writ of

certiorari in order to settle these important questions of federal law and statutory construction.

## III. A DISTRICT COURT MAY NOT GRANT JUDGMENT AS A MATTER OF LAW IN FAVOR OF PLAINTIFFS ON A PURPORTED STATE CLAIM WHERE THE COURTS OF THAT STATE HAVE UNAMBIGUOUSLY REJECTED THE EXISTENCE OF ANY SUCH STATE CLAIM AND WHERE PLAINTIFFS HAVE NO SUBSTANTIAL FEDERAL QUESTION.

The Sixth Circuit also held that respondents had a cause of action under Ohio law. (App., *infra*, at 11a-15a, 18a). However, as the Sixth Circuit recognized, "a local ordinance cannot give rise to federal question jurisdiction." (*Id.* at 18a n.6). As demonstrated above, no federal question jurisdiction can be predicated upon 7 U.S.C. § 1926(b), either by itself or in conjunction with 42 U.S.C. § 1983. As established in the briefs of appellants and cross-appellees in the Sixth Circuit Court of Appeals, respondents also have no substantial federal question under the Fourteenth Amendment Due Process Clause, and the Sixth Circuit chose not to address any such constitutional claim. Absent a substantial federal question, the District Court had no supplemental jurisdiction over any state claim.

Moreover, the Ohio courts that have addressed this issue have refused to recognize a cause of action arising from the subject local legislation. *Krug v. Sebring*, Case No. 92 C.A. 49 (Mahoning Cty. Ct. App. Dec. 30, 1993) (App., *infra*, 129a-133a). As *Krug* recognized, this conclusion follows necessarily from Ohio Supreme Court case law. *Fairway Manor, Inc. v. Bd. of Comm'rs*, 36 Ohio St. 3d 85, 521 N.E.2d 818 (1988), *cert. denied*, 488 U.S. 1005 (1989); *State ex rel. McCann v. City of Defiance*, 167 Ohio St. 313, 148 N.E.2d 221 (1958); *State ex rel. Indian Hill Acres, Inc. v. Kellogg*, 149 Ohio St. 461, 79 N.E.2d 319 (1948). On the basis of this Ohio case law, respondents simply have no Ohio law cause of action under any theory.

Most of the arguments advanced by the Sixth Circuit regarding a possible Ohio cause of action based on Loan Resolution 575-81 were addressed in the preceding section of this petition. As for the Sixth Circuit's reference to a "service map" (App., *infra*, 15a), the evidence admitted at trial emphatically demonstrated that no "meeting of the minds" occurred with regard to such map. (See the discussion of the map in the Statement of Facts, *supra*.) Ohio contract law requires a "meeting of the minds" on the terms and conditions of an express or implied-in-fact contract. *Noroski v. Fallet*, 2 Ohio St. 2d 77, 79-80, 442 N.E.2d 1298 (1982) (per curiam); *Rice v. Wheeling Dollar Savings & Trust Co.*, 155 Ohio St. 391, 397, 99 N.E.2d 301 (1951). The evidence admitted at trial established that no such meeting of the minds occurred with regard to the ambiguous language "service area" and "feasibly and legally be served" in paragraph 14 of the Loan Resolution. (See Statement of Facts, *supra*.) Accordingly, no Ohio theory of express or implied contract can arise under the circumstances of this case.

The Ohio courts unambiguously reject, as a matter of law, any federal or state cause of action by a new or transferred extraterritorial user of a municipal water system based on opposition to annexation as a condition of water service. In addition, the application of Ohio contract law to the record evidence in this case establishes that respondents have no actionable Ohio law theory. The Court should issue a writ of certiorari to review this issue pursuant to the last two grounds specified in Supreme Court Rule 10.1(a).

## IV. THE CLAIM OF PLAINTIFFS ROBERT AND SHARON ROUSE REGARDING SEWER SERVICE SHOULD NOT BE REMANDED FOR DISTRICT COURT DETERMINATION BECAUSE PLAINTIFFS PRESENTED NO EVIDENCE AT TRIAL TO SUPPORT THAT CLAIM.

The Sixth Circuit remanded the claim of respondents Robert and Sharon Rouse regarding sewer service for

determination by the District Court. (App., *infra*, at 25a-26a, 31a). Absolutely no evidence was presented at trial to support this claim. In fact, neither Robert Rouse nor Sharon Rouse even testified. Accordingly, respondents waived this claim by not supporting it at trial. The Court should exercise its power of supervision (Supreme Court Rule 10.1(a)) to correct this departure from the accepted and normal course of judicial proceedings.

## CONCLUSION

As explained above, this case presents significant questions for the Supreme Court's consideration. The Sixth Circuit's published opinion in this case is in serious and substantial conflict with the prior decisions of this Court. Moreover, the Sixth Circuit opinion raises several important questions of federal jurisdiction, federal law, and federal statutory construction. Therefore, petitioner requests that the Court issue a writ of certiorari to the Sixth Circuit Court of Appeals to review its judgment in the instant case.

Respectfully submitted,

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Nos. 93-3354/3384

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

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| MARK E. WAYNE; CARLA L. WAYNE; ROLAND L. KENDRICK; BRET E. SMITH; BRENDA S. SMITH; ROBERT J. ROUSE, JR.; SHARON ROUSE; DONALD G. STILLION; BEVERLY J. STILLION; WILLIAM H. TUEL; MARJORIE R. TUEL; CLAUDE J. BAILEY; MARGARET J. BAILEY; LARRY L. HARTLEY; KATHLEEN J. HARTLEY; JUDY K. COSTELLO; NANCY STUCHELL; and JEFFREY STUCHELL,<br><br>*Plaintiffs-Appellees, Cross-Appellants,*<br><br>v.<br><br>VILLAGE OF SEBRING; J. MICHAEL PINKERTON, Individually, and as Mayor, President of Council, and Acting Village Manager of the Village of Sebring; JAMES R. CONNY Individually, and as President Pro Tempore and Councilman of the Village of Sebring; JOHN W. SMITH, Individually, and as Councilman of the Village of Sebring; DOUGLAS L. EATON, Individually, and as Councilman of the | ) | ON APPEAL from the United States District Court for the Northern District of Ohio |

Village of Sebring; JAMES V. DANIELS, Individually, and as Councilman of the Village of Sebring; ALAN C. FLOWERS Individually, and as Councilman of the Village of Sebring; and JOSEPH E. IGRO Individually, and as Councilman of the Village of Sebring,

*Defendants-Appellants, Cross-Appellees,*

COMMUNITY PROGRAM LOAN TRUST; SHAWMUT BANK, N.A.; GENERAL ELECTRIC CAPITAL CORPORATION; and FARMERS HOME ADMINISTRATION,

*Defendants.*

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Decided and Filed September 29, 1994

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Before: JONES and RYAN, Circuit Judges; and BERTELSMAN, Chief District Judge.*

NATHANIEL R. JONES, Circuit Judge. Plaintiffs are 18 residents of Smith Township, Mahoning County, Ohio, who reside within the service area of the Sebring Village Waterworks System. They brought this civil rights action, pursuant to 42 U.S.C. §§ 1983 and 1985, against, *inter alia*,

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*The Honorable William O. Bertelsman, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

the Village of Sebring and its council members and manager. Plaintiffs challenge Sebring's recently enacted ordinances providing that the village will supply water and sewer service to those outside the village limits only upon the landowners' annexation of the land to Sebring. Pursuant to a motion for summary judgment, the district court dismissed the individual council members and village manager. During a jury trial, the district court directed a verdict in favor of Plaintiffs and against the village on the issue of liability, and granted at least part of the injunctive relief sought by plaintiffs. The jury then awarded Plaintiffs $55,600 in damages. Subsequently, the court awarded Plaintiffs nearly $82,000 in attorney fees.

On appeal, the Defendants contend that the district court should not have directed a verdict in Plaintiffs' favor; rather, it should have either granted one of Sebring's motions for judgment as a matter of law, or at least its motion for a new trial. Defendants also challenge the court's jury instructions on damages and its denial of Defendants' motions to conduct additional discovery after the discovery cut-off date. Finally, the individual defendants who prevailed on summary judgment argue that the court should have granted their request for attorney fees. On cross-appeal, Plaintiffs contend that the court should not have dismissed the village manager and council members from the suit, that the injunction issued by the court should have been broader, and that the court abused its discretion in reducing the attorney fees award from the amount for which Plaintiffs applied.

We affirm the court's grant of summary judgment in favor of the individual defendants, its directed verdict in favor of Plaintiffs, and its denial of Sebring's motions for

judgment as a matter of law and for a new trial. We also affirm the court's jury instructions, its denial of Defendants' motion to conduct additional discovery, and its denial of the individual defendants' application for attorney fees. We reverse the court's award of Plaintiffs' attorney fees and remand for further proceedings. Further, we find that the lower court neglected to consider a portion of Plaintiffs' request for injunctive relief; we remand this one matter for initial consideration by the trial court.

## I. Facts

In 1952, Sebring entered into a contract with the Maple Ridge Water Association ("MRWA"), which consisted of seventy residents living in Smith Township adjacent to Sebring. The MRWA promised to finance and construct the water lines necessary to hook into Sebring's water system in exchange for Sebring's promise to provide MRWA's members with water service, at the members' expense, for the next twenty years. The contract provided that the pipes paid for and installed by the MRWA became the immediate property of Sebring.

In the late 1970s, Sebring's water treatment plant was eroding and in need of repair. Sebring obtained a $3,575,000 loan from the federal Farmers Home Administration ("FmHA"), in consideration for which Sebring issued to FmHA a low interest rate bond payable over the next 40 years. The loan was governed by the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.* Regulations enacted pursuant to this Act provided that, in order to secure the loan, Sebring had to pass an ordinance outlining the manner in which it was to repay

the loan. Using language taken directly from the pertinent regulation, Sebring's [sic] enacted a Loan Resolution providing that Sebring was required to:

> provide adequate service to all persons within the service area who can feasibly and legally be served and to obtain FmHA's concurrence prior to refusing new or adequate services to such persons. Upon failure to provide services which are feasible and legal, such persons shall have a direct right of action against the association or public body.

Loan Resolution ¶ 14 (quoting 7 C.F.R. § 1942.17(n)(2)(vii)).

In September 1987, the FmHA assigned its interest in Sebring's bond to the Community Program Loan Trust as part of the Omnibus Budget Reconciliation Act of 1986. Shawmut Bank served as trustee of the trust, and General Electric Capital Corporation ("GECC") served as the trust's agent.

Although in 1980, Sebring became classified as a city, Sebring lost some of its population over the following ten years. Consequently, after the 1990 census, Sebring was reclassified as a village. Plaintiffs speculate that this reclassification spurred village officials to implement an aggressive annexation campaign.

In November 1990, Sebring enacted an ordinance requiring those who use the village's water and sewer services, residing within Mahoning County but outside of the village proper, to annex their property to the village. Prospective customers would be connected to Sebring's water or sewer services only upon prior annexation, and, as for current customers who failed or refused to annex

their property, their water or sewer services would be disconnected within 180 days. Ordinance No. 1477-90.

Under Ohio law, a municipal ordinance does not become effective for at least 30 days, during which time, if a referendum petition is filed, the ordinance does not become effective until a referendum election is conducted. Ohio Rev. Code Ann. § 731.29. Such a petition was filed with regard to Sebring's Ordinance No. 1477-90, staying the resolution from taking effect. Six days after the petition was filed, the village council passed an emergency ordinance, No. 1481-90, which implemented the provisions of 1477-90 immediately without the referendum process. Subsequently, Ordinance No. 1477-90 was defeated in the referendum election of November 1991, but Defendants continued their policy of denying water service to non-residents who declined to annex their property to the village.

In January 1991, FmHA sent a letter informing Sebring officials that the village was still obligated to the terms of its Loan Resolution. This letter did not deter Sebring from enforcing its new ordinance. Sebring sent a letter to Plaintiff Roland L. Kendrick, who had been a customer of Sebring's water service since 1952. Kendrick was in the process of selling his home. The letter informed him that the purchaser would have to agree to annexation in order to receive water service. Kendrick claims this annexation policy resulted in the purchaser's backing out of the deal. Plaintiff Judy K. Costello similarly claims that Sebring's refusal to transfer water rights upon the sale of her home made it impossible for her to sell the home.

Plaintiffs Mark E. and Carla L. Wayne, who were building a new home in the area, received permission to tap into Sebring's water lines prior to the enactment of Ordinance No. 1477-90, and had already paid a tap-in fee. Sebring's refusal to provide water service to the Waynes unless they annexed the property rendered the Waynes unable to obtain financing to build their home.

Until Plaintiffs Jeffrey and Nancy Stuchell lost their home in a fire, they were customers of Sebring's water service. After the fire, they purchased a mobile home and moved it onto their property, but Sebring refused to provide water service. They sold their mobile home at a loss.

Plaintiffs Bret E. and Brenda S. Smith purchased their home and began to receive water service from Sebring just before Ordinance No. 1477-90 was enacted. Without any notice, the Smiths returned home one day to find Sebring employees digging up the water pipes in their yard.[1] The Smiths went without water for eight months before they drilled a well to meet their water needs.

In April 1991, GECC sent a letter to Sebring informing its officials that Ordinance Nos. 1477-90 and 1481-90 violated the terms of the bond documents and the Loan Resolution. The village council responded by attempting to repeal the Loan Resolution. Ordinance No. 805-91.

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[1] Although Sebring contends that Bret Smith testified that he did have advance notice that his water would be shut off, the trial transcript shows that Smith testified that he was informed that his water would be turned off only upon his arrival home, when he asked the men digging in his yard what they were doing. J.A. at 1058-59.

GECC notified the council that the trust refused to acquiesce in this attempted repeal, and that Sebring remained bound by the terms of the Loan Resolution.

In October 1991, Plaintiffs initiated the instant litigation against, *inter alia*, the Village of Sebring and the village's council members and manager, claiming that Ordinance Nos. 1477-90 and 1481-90 violated their rights under the Consolidated Farm and Rural Development Act, and the Due Process, Equal Protection, and Privileges and Immunities Clauses of the United States Constitution.[2] All of the Plaintiffs except for Robert J. and Sharon Rouse sought: (1) a declaratory judgment that the Loan Resolution and the terms of the bond documents remained binding and that Defendants' acts violated Plaintiffs' rights to water service; (2) an order enjoining the termination of their water service; and (3) costs and attorney fees. The Rouses sought identical relief with regard to sewer service rather than water service. Additionally, Kendrick, Costello, the Waynes, the Stuchells, and the Smiths sought compensatory and punitive damages.

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[2] In addition to Kendrick, Costello, the Waynes, the Stuchells, and the Smiths, Plaintiffs include fellow Smith Township residents Robert J. and Sharon Rouse, Donald G. and Beverly J. Stillion, William H. and Marjorie R. Tuel, Claude J. and Margaret J. Bailey, and Larry L. and Kathleen J. Hartley. In addition to the Village of Sebring itself, Defendants include Mayor and Council President J. Michael Pinkerton, Village Councilmembers James R. Conny, John W. Smith, Douglas L. Eaton, James V. Daniels, Alan C. Flowers, Joseph E. Igro, the Community Program Loan Trust, the Shawmut Bank, GECC, and FmHA. The latter four defendants were dismissed from the suit by the district court, and are no longer parties on appeal.

The district court granted summary judgment in favor of all of the individual village officials on the basis of qualified immunity. By September 1992, when the matter was tried before a jury, the only remaining defendant was Sebring. During the trial, both parties moved for directed verdicts. Deciding that the issue of liability was purely a question of law, the court granted Plaintiffs' motion, reasoning that: (1) Plaintiffs enjoyed a property interest in continued water service protectible by the Due Process Clause, and that Sebring deprived Plaintiffs of this interest without providing notice or an opportunity for Plaintiffs to be heard; (2) Plaintiffs are entitled to receive continued water service on the basis of the Loan Resolution; and (3) Plaintiffs are also entitled to continued water service pursuant to 7 U.S.C. § 1926. The court enjoined Sebring from discontinuing water service to Plaintiffs' properties so long as Plaintiffs and their successors and assigns comply with all lawful rules and regulations regarding the receipt of water service. Perhaps due to an oversight, the court did not include sewer service within the injunction, nor did it otherwise discuss sewer service.

The court submitted the question of damages to the jury, which returned a verdict for $55,600.[3] Subsequently, the court awarded Plaintiffs $81,797.56 in attorney fees pursuant to 42 U.S.C. § 1988. This was far less than Plaintiffs' counsel requested; the court disallowed much of the time claimed due to excessiveness, duplication and

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[3] The jury awarded $5,000 to Kendrick, $12,000 to Costello, $10,000 to the Waynes, $15,000 to the Smiths, and $13,600 to the Stuchells.

limited success, and reduced the hourly rate based on the court's understanding of prevailing local market rates. The court also denied the individual defendants' application for attorney fees. This appeal followed.

## II. Discussion

### A. Motions for Judgment as a Matter of Law, and for New Trial

When reviewing a district court's decision to grant or deny a motion for judgment as a matter of law, we apply the same standard as that used by the district court: the court should neither weigh the evidence, evaluate the credibility of the witnesses, nor substitute its judgment for that of the jury; rather it must view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences. *Agristor Leasing v. A.O. Smith Harvestore Products*, 869 F.2d 264, 268 (6th Cir. 1989). "Only when it is clear that reasonable people could come to but one conclusion from the evidence should a court grant a motion for directed verdict." *Lewis v. City of Irvine*, 899 F.2d 451, 454-55 (6th Cir. 1990); *see also Marsh v. Arn*, 937 F.2d 1056, 1060 (6th Cir. 1991).

We review the court's denial of Defendants' motion for a new trial only for abuse of discretion; the trial court should deny such a motion if the verdict is one that reasonably could be reached, regardless of whether the trial judge might have reached a different conclusion were he the trier of fact. *United States v. L.E. Cooke Co.*, 991 F.2d 336, 343 (6th Cir. 1993). An abuse of discretion exists when the reviewing court is firmly convinced that a

mistake has been made. *In re Benedectin Litigation*, 857 F.2d 290, 307 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152, 156-57 (6th 1988).

The district court provided three separate rationales for directing a verdict in Plaintiffs' favor on the issue of liability: first, that Sebring violated Plaintiffs' procedural due process rights; second, that Sebring violated its own Loan Resolution; and third, that Sebring violated the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.* If we agree with even one of these rationales, we are obliged to affirm.

### 1. Procedural Due Process

Because we agree with the district court's rationales based on statutory law, it is not necessary for us to reach the constitutional issues raised by the parties' due process arguments.

### 2. Loan Resolution

The Loan Resolution, which Sebring was required to enact under the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.*, guarantees the right of continued water service to all rural residents within a defined service area, where providing such service is legal and feasible. The defined area included Plaintiffs' properties. There can be no doubt that it is legal and feasible for Sebring to provide such service to Plaintiffs; it has been doing so for years and it continues to do so now.

It follows that Sebring may not withdraw its offer of service so long as the Loan Resolution remains in effect.

Defendants present four arguments intended to evade this conclusion. We find all four to be meritless. First, Defendants cite *Fairway Manor, Inc. v. Bd. of Comm'rs*, 36 Ohio St. 3d 85, 89, 521 N.E.2d 818, 822 (1988), *cert. denied*, 488 U.S. 1005 (1989), for the proposition that municipally-owned utilities have no duty under state law to sell their products to non-residents in perpetuity merely because they once agreed to do so. However, *Fairway Manor* did not involve any statutory obligation arising under federal law or under local ordinance. In the present case, though, the Loan Resolution, and the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.*, created the duty to continue supplying water, not in perpetuity, but at least for the 40 year term of the loan.

Second, Defendants point out that § 1926(a)(20) expressly prohibits the Secretary of Agriculture from conditioning approval of FmHA loans upon requirements other than those specified under the Act. They conclude from this that the administrative regulations, which gave rise to the Loan Resolution, are invalid. There are two problems with this argument. First, § 1926(a)(20) became effective in 1990, too late to have any effect on litigation arising from an FmHA loan made in the late 1970s pursuant to the regulations as they existed at that time. Second, § 1926(a)(20)'s prohibition on the Secretary's rulemaking authority is extremely limited in light of § 1989(a), which is also part of the Act. This latter section provides that "[t]he Secretary is authorized to make such rules and regulations, prescribe the terms and conditions

for making or insuring loans, security instruments and agreements, except as otherwise specified herein, and make such delegations of authority as he deems necessary to carry out this chapter."[4] From § 1989, it follows that all of the regulations that are relevant to the present case remain valid, § 1926(a)(20) notwithstanding.

Next, Defendants contend that the Loan Resolution was binding only so long as FmHA held Sebring's bond. The Resolution provides that it "shall be binding upon [Sebring] as long as the bonds are held or insured by the Government." *Accord* 7 C.F.R. § 1942.1(c) ("Loans sold without insurance by FmHA to the private sector will be serviced in the private sector and will not be serviced under this subpart."). In support of this proposition, Defendants rely upon *Krug v. Sebring*, Case No. 92 C.A. 49 (Mahoning Cty. Ct. App. December 30, 1993). In *Krug*, a group of residents of the Village of Beloit, which is just east of Sebring, sought an order directing Sebring to extend its waterlines to Beloit.[5] The plaintiffs' theory was

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[4] Subsections 1989(b) through (d) set forth specific limits to the Secretary's rulemaking authority that are not relevant in the present case.

[5] *Krug* is unlike the present case in several respects. The *Krug* plaintiffs seek an extension of Sebring's water service whereas Plaintiffs in the present case seek continuation of service. Also, unlike the *Krug* plaintiffs, many of the present plaintiffs enjoy contracts with Sebring for such service. Finally, it is not clear from the *Krug* opinion whether or not Beloit is within Sebring's service area as defined by Sebring and FmHA, or whether service to Beloit would be engineeringly and economically feasible. Thus, our criticism of one aspect of *Krug* does not imply that we have an opinion as to whether the *Krug* plaintiffs should ultimately prevail.

based on the same loan resolution that is at issue in the present case. The trial court granted summary judgment in favor of Sebring, and the Mahoning County Court of Appeals affirmed, holding that the Loan Resolution ceased to be binding on Sebring as of 1987 when FmHA sold Sebring's bond to the Community Program Loan Trust.

We reject the state court of appeals' interpretation of federal law. The court failed to consider that when Congress ordered the sale of these sorts of bonds to private corporations as part of the Omnibus Budget Reconciliation Act of 1986, it also provided that, but for one exception not relevant to *Krug* or to the present case, the sale "shall not alter the terms specified in the note or other obligation." Pub. L. 99-509 § 1001(c) (reprinted in "Historical and Statutory Notes" to 7 U.S.C.A. § 1929a (1988)). This provision is clear enough on its face to dispose of Defendants' argument, *Krug* notwithstanding.

Moreover, FmHA has expressly rejected Defendants' position. *See* J.A. at 1745 (Letter from FmHA to Sebring) (explaining that despite the sale of the bond from fmHA to GECC in 1987, Sebring is still obligated to the terms and conditions of the Loan Resolution; "The City now is simply obligated to GECC instead of FmHA . . . to provide service (water) to all areas that can be engineeringly and economically feasibly served."). It is well-settled that, where a government agency has administrative authority over a statute, we are obliged to accord great deference to the agency's reasonable interpretation of that statute. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

Finally, Defendants contend that Sebring and FmHA never enjoyed a "meeting of the minds" regarding their obligation to provide service to non-residents, when, in the late 1970s, they contracted to receive FmHA funds. However, documents in the record, including a service area map that establishes the scope of Sebring's obligation to provide water service, indicate that Defendants fully understood their obligation to provide service to the properties owned by Plaintiffs.

### 3. 7 U.S.C. § 1926

The Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.*, grants the Secretary of Agriculture the authority to make or insure loans to associations, including municipalities, to provide for "the conservation, development, use, and control of water." § 1926(a)(1). Section 1926(b) provides:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

*a.*

The first provision of this section, on its face, prohibits anyone from curtailing or conditioning the offer of water service based on inclusion within municipal borders. Defendants dismiss this facially apparent interpretation of the statute by presuming that this language only applies where the municipality to which the statute refers is an entity separate from the association. *See* Defendants' Br. at 43. That this presumption is unwarranted is obvious from the use of the phrase, "*any* municipal corporation or other public body." Defendants' presumption would render the word "any" meaningless. *Accord Pinehurst Enters. v. Town of Southern Pines*, 690 F. Supp. 444, 451 (M.D.N.C. 1988) ("Section 1926(b) establishes a bright line rule; it unambiguously prohibits any curtailment or limitation of an FmHA indebted association's service by municipal annexation. . . . ") (emphasis omitted), *aff'd*, 887 F.2d 1080 (4th Cir. 1989); *Jennings Water, Inc. v. City of North Vernon*, 682 F. Supp. 421, 425 (S.D. Ind. 1988) (describing § 1926(b)'s prohibition on limiting service to rural residents as "unequivocal"), *aff'd*, 895 F.2d 311 (7th Cir. 1989).

*b.*

Most of the cases arising under § 1926(b) have involved a municipality's attempt to encroach on a rural water association's area of service. Courts have uniformly understood the section as forbidding such encroachment, concluding that § 1926(b) "should be given a liberal interpretation that protects rural water associations indebted

to the FmHA from municipal encroachment." *Jennings Water*, 895 F.2d at 315 (citing *Glenpool Utilities Auth. v. Creek Cty. Rural Water Dist. No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989); *City of Madison v. Bear Creek Water Ass'n*, 816 F.2d 1057 (5th Cir. 1987); *Pinehurst Enters.*, 690 F. Supp. at 444; *Moore v. Bayou Water Ass'n v. Town of Jonestown*, 628 F. Supp. 1367 (N.D. Miss. 1986); *Rural Dist. No. 3 v. Owasso Utilities Auth.*, 530 F. Supp. 818 (N.D. Okla. 1979)). The *Jennings Water* court, for example, held that "[t]he statute explicitly prohibits municipal encroachment on a rural water association's service area by means of annexation or grant of private franchise." *Id.* at 314; *see also Glenpool Utilities Auth.*, 861 F.2d at 1214 (same); *Bear Creek*, 816 F.2d at 1059 (same).

From these cases, the district court reasoned that, under a broad reading of § 1926(b), the statute was "intended to insure water service to rural residents free from obligations imposed by municipalities that are not directly associated with the cost of that service." J.A. at 128. This is especially true of obligations pertaining to annexation. *Id.*

Defendants criticize this reasoning, contending that §§ 1926(a)(7) and (a)(13) "clearly and expressly contemplate that water facility loans will be provided *for the benefit of municipal residents of small towns*. Nothing is said about any extraterritorial users of such municipal water systems." Defendants' Br. at 42. This argument is based upon the statute's reference to residents of a "rural community." However, we reject Defendants' presumption that one who lives just outside of the border of a village proper is not a member of the "rural community" that also encompasses the village. The word "community"

conveys a meaning broader than the phrase "resident of a municipality." We hold that anyone residing about and around a village may be regarded as a member of the same general community within the meaning of the statute. *Cf.* § 1926(a)(7) (defining "rural area").

Defendants also argue that the Consolidated Farm and Rural Development Act does not give rise to a private right of action. Defendants cite *Smith v. Dearborn Fin. Services* for the proposition that "federal regulations cannot themselves create a cause of action. . . . That authority lies solely with Congress." 982 F.2d 976, 979 (6th Cir. 1993) (citing *Stewart v. Bernstein*, 769 F.2d 1088, 1092-93 n.6 (5th Cir. 1985); *Marshall v. Gibson's Prods., Inc. of Plano*, 584 F.2d 668, 677-78 & n.16 (5th Cir. 1979)).

These cases are inapposite and the argument is meritless. First, 7 C.F.R. § 1942.17(n)(2)(vii) provides that an applicant for FmHA funds must *agree*, as a condition of receiving funds, that a person within the service area who can feasibly and legally receive water service has a direct private right of action against the fund recipient if the recipient fails to make adequate service available. Sebring did so agree. Thus, the private right of action was created, not by the federal regulation, but by the municipal body itself, pursuant to local ordinance.[6]

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[6] Of course, a local ordinance cannot give rise to federal question jurisdiction; thus, were this ordinance the only source of the private right of action, the action would not lie in federal court. However, in the present case, in which Plaintiffs allege due process violations and a § 1983 cause of action, the federal courts have supplemental jurisdiction, formerly known as pendent jurisdiction, over the right of action created by local ordinance. *See* 28 U.S.C. § 1367(a).

More importantly, Plaintiffs have a private right of action under § 1983, which provides a private cause of action for "the deprivations of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Defendants' claims to the contrary notwithstanding, *Smith* is concerned only with a direct private right of action, and not with a right of action pursuant to § 1983. Ever since *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), the Supreme Court has held that § 1983 provides a private cause of action for violations of federal statutes as well as the Constitution. The coverage of § 1983 is to be "broadly construed." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989). The Court has recognized only two exceptions under which statutory violations are not actionable:

> A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) "the statute does not create enforceable rights, privileges, or immunities within the meaning of § 1983," or (2) "Congress has foreclosed such enforcement of the statute in the enactment itself."

*Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 (1990) (quoting *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 423 (1987)).

To determine whether the first of these two exceptions applies, the Court has developed a three part test:

> (1) Was the provision in question intended to benefit the plaintiff?
>
> (2) Does the statutory provision in question create binding obligations on the defendant governmental unit, rather

than merely expressing a congressional preference?

and (3) Is the interest the plaintiff asserts specific enough to be enforced judicially, rather than being "vague and amorphous"?

*Wilder*, 496 U.S. at 509; *Golden State*, 493 U.S. at 106. The plaintiff bears the burden of proof for showing that this exception does not apply. *Golden State*, 493 U.S. at 106.

As for the second of the two exceptions, the only way Congress forecloses § 1983 enforcement is by "providing a comprehensive enforcement mechanism for protection of a federal right." *Id.* Mere availability of administrative protections is not sufficient. *Id.* "Rather, the statutory framework must be such that allowing a plaintiff to bring a § 1983 action would be inconsistent with Congress' carefully tailored scheme." *Id.* at 107. "We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Id.* (quoting *Wright*, 479 U.S. at 423-24). The defendant bears the burden of proof for showing that this exception applies. *Id.*

Neither of the two exceptions apply to § 1926(b). The overwhelming weight of authority is that the purpose of the statute is to protect rural water service users access to clean, safe water. The language of the provision is mandatory, making it binding on municipalities. The interest that the statute protects is judicially enforceable. And Congress provided no enforcement mechanism for protecting the right that § 1926(b) creates. Thus, pursuant to § 1983, § 1926(b) gives rise to a private right of action on the part of rural water service users.

4.

For the foregoing reasons, at least two of the three rationales offered by the district court in support of its directed verdict are correct. We therefore affirm the court's directed verdict in favor of Plaintiffs, and its denial of Defendants' motions for judgment as a matter of law. Defendants offer no additional arguments in support of their contention that the lower court should have granted their motion for a new trial. It follows that the district court did not abuse its discretion when it denied this motion.

### B. Jury Instructions on Damages

In reviewing a district court's jury instructions, we will reverse "only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 72-73 (6th Cir. 1990). Defendants contend that violations of the Loan Resolution and the Consolidated Farm and Rural Development Act sound in contract rather than in tort. They cite no authority for this proposition. From this premise, it would follow that the district court erred by instructing the jury that damages should compensate Plaintiffs for discomfort and annoyance attributable to Defendants' conduct. This argument is meritless, however, for it is well settled that a prevailing § 1983 plaintiff, like a prevailing party in a common law tort action, can recover for any compensable injury caused by the defendants' breach of duty. *See Carey v. Piphus*, 435 U.S. 247, 254-57 (1978).

### C. Discovery

"In reviewing the District Court's decision to limit discovery, this Court will intervene only if it was an abuse of discretion resulting in substantial prejudice." *Elvis Presley Enters. v. Ellvisly Yours, Inc.*, 936 F.2d 889, 893 (6th Cir. 1991). Defendants contend that the district court improperly curtailed their right to discovery. Defendants failed to take depositions before the district court's discovery cut-off date. They contend that during this period they had a summary judgment motion pending based on legislative or qualified immunity, and that, during the pendency of such motions, discovery should not be allowed. Defendants' Br. at 48-49 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The problem with this argument is that the Village itself did not move, and could not have moved, for dismissal on this basis; therefore it should have proceeded with discovery during the assigned discovery period. Thus, the district court's denial of Defendants' motions to conduct additional discovery after the cut-off date was not an abuse of discretion.

### D. Attorney Fees for the Individual Defendants

Although a prevailing § 1983 *plaintiff* is entitled, under 42 U.S.C. § 1988, to recover his reasonable attorney fees, a prevailing *defendant* should only recover upon a finding by the district court that "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *Tarter v.*

*Raybuck*, 742 F.2d 977, 985 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051(1985). The Supreme Court has instructed district courts considering prevailing defendants' applications for attorney fees to "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22. The decision is committed to the discretion of the trial judge, and is reviewed only for abuse of discretion. *Tarter*, 742 F.2d at 986.

The individual defendants, who won summary judgment on the basis of qualified immunity, contend that they should have recovered attorney fees. They maintain that Plaintiffs knew or should have known that this cause of action was novel and that their rights were not yet clearly established. However, as the district court acknowledged, J.A. at 147-48, Plaintiffs also sued the individual defendants for injunctive relief, which was not barred by qualified immunity. The request for injunctive relief was obviously neither frivolous nor groundless. Thus, the court did not abuse its discretion in denying the individual defendants' application for fees.

### E. Summary Judgment in Favor of Individual Defendants

Plaintiffs' first issue on cross-appeal is the court's grant of summary judgment in favor of the individual village officials on the basis of qualified immunity.

> We review a district court's grant of summary judgment *de novo*. . . . [I]n a motion for summary

> judgment, 'credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

*Russo v. City of Cincinnati*, 953 F.2d 1036, 1041-42 (6th Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), and citing *Vollrath v. Georgia-Pacific Corp.*, 899 F.2d 533, 534 (6th Cir.), *cert. denied*, 490 U.S. 940 (1990); *Curry v. Vanguard Ins. Co.*, 923 F.2d 484, 485 (6th Cir. 1991)).

"A public official is entitled to qualified immunity for conduct in performing discretionary functions so long as that conduct does not violate clearly established statutory or constitutional rights of which a reasonable officer would have known." *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). "To find that a clearly established right exists, the district court must find binding precedent by the Supreme Court, this court, the highest court in the state in which the action arose, or itself, so holding." *Id.* The application of qualified immunity is a purely legal question to be reviewed *de novo*. *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 339 (6th Cir. 1990).

Plaintiffs contend that the district court erred in finding that, back in 1991, a reasonable official could have believed that Plaintiffs were not entitled to continued water service. Plaintiffs cite to the letters from FmHA and GECC informing Defendants of their obligations. However, letters from an administrative agency and a private corporation do not constitute "binding precedent by the

Supreme Court, this court, the highest court in the state in which the action arose, or itself." *Wegener*, 933 F.2d at 392. Thus, they do not suffice to clearly establish the right in question.

**F. Breadth of Injunction**

Plaintiffs contend that the district court erred in failing to extend the injunction to protect customers of Sebring's sewer service. The Rouses requested this relief in the complaint, at trial, and by post-judgment motion. However, the court below did not address this request at all.

The decision to grant a permanent injunction "is within the judicial discretion of the District Judge." *Clemons v. Bd. of Educ.*, 228 F.2d 853, 857 (6th Cir. 1956); *accord id.* at 859 (Sewart, J., concurring); *id.* at 860 (Miller, J., dissenting). This implies that we review only for abuse of discretion. Nevertheless, although the court below had discretion regarding whether to grant a broader injunction or not, it abused this discretion when it failed to address the issue at all. *Cf. Foman v. Davis*, 371 U.S. 178, 182 (1962) ("The grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion."); *Glover v. Johnson*, 855 F.2d 277, 284 (6th Cir. 1988) (holding that, with regard to preliminary injunction, a district court abuses its discretion if it fails to make specific findings regarding the various factors it is required to consider).

Plaintiffs briefed the merits of their sewer service claim at length and ask us to extend the injunction ourselves. Although we are sympathetic with Plaintiffs' position that the Rouse's are entitled to relief with regard to sewer service for the very same reasons that the other plaintiffs are so entitled with regard to water service, we believe that the district court should be the one to address Plaintiffs' arguments in the first instance.

### G. Plaintiffs' Attorney Fees Award

A prevailing § 1983 plaintiff is entitled to recover his or her reasonable attorney fees. 42 U.S.C. § 1988; *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). When considering a petition for attorney fees, a court must first determine whether the petitioning plaintiff was the prevailing party. *Id.* at 433. The next step is to determine what fee is "reasonable." *Id.* A starting point is to calculate "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* (This is known as the "lodestar" calculation.) The court should then exclude excessive, redundant, or otherwise unnecessary hours. *Id.* at 434. Next, the resulting sum should be adjusted to reflect the "result obtained." This involves two questions: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.*

An appellate court reviews a district court's application of *Hensley's* step-by-step analysis for abuse of discretion. *Id.* at 437. However,

> This Circuit has set up a three-tier review standard for determining the reasonableness of the requested hours billed by a prevailing party. We apply a clearly erroneous standard when reviewing a district court's determination that a prevailing party has or has not worked the hours the party claims to have worked. We determine whether the District Court erred when reviewing legal questions concerning the relationship of the hours billed to the points on which the party prevailed. We look to see whether the District Court has misapplied the reasonable practices of the profession when determining whether a party used poor judgment in billing the opposing party for hours spent on the case.

*Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1176 (6th Cir. 1990).

**1. Number of Hours**

The district court reduced the number of hours that Plaintiffs claimed to have spent on this case for three separate reasons. First, it held that some of the hours claimed were excessive. Second, it held that some of the hours claimed were duplicative. Third, it held that some of the hours claimed were spent on unsuccessful claims against dismissed defendants. J.A. at 141-43.

The lower court's determination that an indefinite number of the hours claimed by Plaintiffs are excessive or duplicative is a finding of fact, which is to be affirmed unless clearly erroneous. *Wooldridge*, 898 F.2d at 1176. Plaintiffs have not come close to showing clear error with

regard to this finding. They correctly point out that the time spent seeking alternative dispute resolution, settlement, a TRO, as well as the time spent traveling, is fully compensable, *see, e.g., Ferotti v. Seiter*, 935 F.2d 761, 764 (6th Cir. 1991), but the district court did not hold to the contrary. Rather, the court excluded an undefined amount Plaintiffs' counsels' claimed time because, based on its experience, it believed the attorneys exaggerated or duplicated the amount of the time they actually spent.

However, the lower court erred as a matter of law in rejecting some of the hours claimed on the ground that they must have been spent on unsuccessful claims against dismissed defendants. The Supreme Court has instructed that, where "the plaintiff's claims for relief . . . involve a common core of facts or [are] based on related legal theories":

> Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim by claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation. . . . In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and

> the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

*Hensley*, 461 U.S. at 435.

In the present case, there is only one common core of facts implicating both Sebring and the individual defendants who prevailed on summary judgment. No separate issues were raised against the prevailing defendants that were not raised against Sebring itself. This suit is not "a series of discrete claims." Further, Plaintiffs (with the possible exception of the Rouses) have achieved excellent results: they received both the injunction and the damages that they sought. On remand, it is possible that the Rouses, too, will achieve excellent results. Under *Hensley*, it follows that Plaintiffs' claim for attorney fees should not be reduced simply because some indeterminate amount of time was expended on the prevailing individual defendants.

The lower court did not make it at all clear how much of the time it disallowed was attributed to excessiveness or duplication, and how much was attributed to its theory of limited success. This was an error. *Wooldridge*, 898 F.2d at 1176 ("A district court should state with some particularity which of the claimed hours the court is rejecting, which it is accepting, and why."). Therefore remand is necessary in order for the court to clarify which of Plaintiffs' counsels' claimed hours are disallowed due to excessiveness or duplication. On remand, the lower court is instructed to award all of the non-excessive, non-duplicative hours claimed by Plaintiffs, undiminished by any theory of "limited success" attributable to time spent on the prevailing defendants. If

it turns out that the Rouses do not prevail in their request for a broader injunction, then the court is allowed to reduce the fee award by the time spent exclusively researching the sewer service issue.

### 2. Hourly Rate

A district court has broad discretion to determine what constitutes a reasonable hourly rate for an attorney. *Louisville Black Police Officers Organization v. City of Louisville*, 700 F.2d 268, 277-78 (6th Cir. 1983). Plaintiffs' two attorneys asked for $145 and $110 per hour, respectively. The lower court felt that this amount was too much based on the attorneys' experience, their performance in court, the complexity of the issues, the novelty of the case, and the prevailing market rate. It found that an appropriate rate was $100 for out-of-court work, and $125 for in-court work.

Plaintiffs contend that the court should have considered the prevailing market rates for the attorneys' home practice, insofar as no local counsel was willing to take the case. Sixth Circuit precedent, however, provides that, under these circumstances, it is not an abuse of discretion for a court to apply local market rates. *Louisville Black Police Officers*, 700 F.2d at 277-78.

Plaintiffs also contend that the lower court should not have awarded a lower rate for out-of-court work, but according to *Louisville Black Police Officers*, this two-tiered approach is legitimate. *Id.* at 273.

## III. Conclusion

For the foregoing reasons, we affirm the district court's directed verdict in favor of Plaintiffs on the issue of liability, its denial of Defendants' motions for judgment as a matter of law and for a new trial, its jury instructions, its decision to limit discovery, its denial of the prevailing defendants' request for attorney fees, and its grant of summary judgment in favor of the individual defendants. We remand the issue of whether the injunction should encompass sewer service for initial consideration by the lower court. Finally, we reverse the court's award of Plaintiffs' attorneys fees, and remand for a determination of which of Plaintiffs' counsels' claimed hours are excessive or duplicative.

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Nos. 93-3354/3384

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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|---|---|---|
| MARK E. WAYNE, ET AL.,<br>Plaintiffs-Appellees/<br>Cross-Appellants,<br>v.<br>THE VILLAGE OF SEBRING, ET AL.,<br>Defendants-Appellants/<br>Cross-Appellees,<br>COMMUNITY PROGRAM LOAN TRUST, ET AL.,<br>Defendant. | ) | ORDER<br>(Filed Dec. 29, 1994) |

**BEFORE:** JONES and RYAN, Circuit Judges; and BERTELSMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

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*Hon. William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk pe

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, et al., Defendants. | ) | CASE NO. 4:91CV2016<br>ORDER<br>(Filed Nov. 14, 1991) |

On November 13, 1991, a status conference was held in the above-captioned case. Counsel for all parties were present and participated. During the conference, the parties identified their respective positions and their expectations as to the resolution of this matter.

The Solicitor for the Village of Sebring indicated that the Village of Sebring expects, as they have in the past, that people who live outside the Village, but in an area where water service is feasible, and desire water service from Sebring to sign a contract for said service. The contract will entitle them to water at a premium price, and will require them to agree to annexation to the Village if asked to do so in the future. The Village takes the position that it need not provide service to those who do not sign the contract.

Counsel for the plaintiffs indicated that the plaintiffs would like Sebring to provide assurances that it will continue to provide water service to the current residents and future residents, without requiring future residents

to sign an additional contract with Sebring. Counsel for plaintiffs are also seeking damages suffered by the individual plaintiffs as the result of the denial or potential denial of water services by Sebring.

Both counsel for plaintiffs and the Solicitor for Sebring expressed optimism in the prospect of a compromise that would settle this matter. In light of this, the Court hereby stays discovery until January 21, 1992 to allow the parties to negotiate a possible settlement. Further, a status conference will be held on January 21, 1992 at 12:00 noon. All parties that have yet to file an answer are granted leave until after the stay to do so. Additionally, plaintiffs and defendant Sebring are directed to file with the Court an update of the negotiations on or before January 6, 1992.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

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UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

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|---|---|
| Mark E. Wayne<br>Plaintiff(s),<br>vs.<br>The Village of Sebring, et al.,<br>Defendant(s). | JUDGE DAVID D. DOWD, JR.<br>NO. 4:91CV2016<br>NOTICE<br>(Filed Nov. 14, 1991) |

TAKE NOTICE that the above-entitled case has been scheduled for a STATUS CONFERENCE at 12:00 Noon, on January 21, 1992, in Room 572, Federal Building – U.S. Courthouse, 2 South Main Street, Akron, Ohio, before the Honorable David D. Dowd, Jr., United States District Judge.

DATE November 14, 1991

GERI M. SMITH
Clerk

By /s/ Deborah W. Mattei
Deborah W. Mattei
Courtroom Clerk to the
Honorable David D. Dowd, Jr.
(216) 375-5706

To: COUNSEL OF RECORD/PRO SE PARTIES
Counsel are requested to contact the Courtroom Clerk, by telephone, prior to 2:00 P.M., one business day prior to the above scheduled status conference to confirm that they will attend.

ANY REQUESTS FOR CONTINUANCE OF THE ABOVE SCHEDULED STATUS CONFERENCE MEETING MUST BE MADE BY WRITTEN MOTION PRIOR TO THE ABOVE SCHEDULED DATE.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Mark E. Wayne, et al.<br>Plaintiffs,<br>vs.<br>Village of Sebring, et al.<br>Defendants. | ) | CASE NO. 4:91 CV 2016<br>ORDER<br>(Filed Jan. 22, 1992) |

On January 21, 1992, a status conference was conducted in the above-captioned case. Counsel for all parties were present and participating. The Court was informed that the Village of Sebring has made a proposed settlement, and the plaintiffs have offered a counter-proposal. Since there appears to be a good possibility that this case can settle, the Court instructs the parties to continue settlement negotiations. Further, the Court appoints United States Assistant Attorney Annette Butler to mediate the negotiations. Ms. Butler will appraise the Court of the settlement progress in writing by February 29, 1992. Discovery is stayed during the negotiation period.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, et al. Defendants. | ) | CASE NO. 4:91 CV 2016 ORDER (Filed May 6, 1992) |

The Court has before it defendants J. Michael Pinkerton, James R. Conny, John W. Smith, Douglas L. Eaton, James V. Daniels, Alan C. Flowers, and Joseph E. Igros' motion to stay discovery pending the determination of their motion for judgment on the pleadings on the basis of qualified and legislative immunity. In light of the pending motion, the Court hereby stays discovery solely as it regards the defendants named above. Discovery on the remainder of the case will continue until June 1, 1992, as originally scheduled.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, et al., Defendants. | CASE NO. 4:91 CV 2016<br>ORDER<br>(Filed Jun. 12, 1992) |

The court's docket in this case reflects the fact that there have been numerous filings recently in this matter, mostly relating to deadline dates for discovery and the filing of dispositive motions. In an effort to keep this case on track, the court resolves the non-dispositive motions in the following manner:

1. Defendants Community Program Loan Trust, Shawmut Bank, N.A., and General Electric Capital Corporation have moved to stay discovery against them until this court resolves their pending motion to dismiss. This motion is granted.

2. Defendants Pinkerton, Conny, Smith, Eaton, Daniels, Flowers and Igro have moved for leave to file a reply to their motion for judgment on the pleadings (Docket No. 54). Defendants are granted leave until June 26, 1992 to file their reply.

3. Defendants Pinkerton, Conny, Smith, Eaton, Daniels, Flowers and Igro have moved for

reconsideration of their motion to stay all discovery until the issue of immunity is resolved (Docket No. 48). In a prior order, the court stayed discovery as it pertained to the moving defendants. For lack of good cause shown, the court denies the motion for reconsideration.

4. Defendants Village of Sebring, Charles Tiech, Pinkerton, Conny, Smith, Eaton, Daniels, Flowers, and Igro have also moved for an enlargement of time in which to respond to plaintiffs' discovery requests (Docket No. 48). The court will defer ruling on this motion until after the issue of immunity is resolved.

5. Plaintiffs have also moved for leave to exceed the twenty page limit on motions in light of the complex issue raised by the defendants (Docket No. 52). Plaintiffs' motion is granted only as it relates to plaintiffs' response to defendants motion for judgment on the pleadings.

6. Plaintiffs also move for leave to supplement their memorandum in opposition to the defendants' motion for judgment on the pleadings (Docket No. 53). Plaintiffs claim that they need further discovery on the issue of how many people are affected by the Village of Sebring's policy on water rights before they can adequately defend against defendants' motion. The court finds, however, that the plaintiffs' memorandum in opposition to defendants motion reflects that plaintiffs have already adequately briefed the issue, and have provided sufficient support for their arguments. Plaintiffs' motion to supplement their memorandum in opposition is denied.

7. Defendants Community Program Loan Trust 1987A, Shawmut Bank, N.A., and General Electric Capita Corp. move for a stay of discovery against them until after resolution of the moving parties' motion to dismiss (Docket No. 55). This motion is granted.

8. Plaintiffs have moved to extend discovery from June 1, 1992 until July 15, 1992, and to extend the deadline for filing dispositive motions from June 15, 1992 to July 30, 1992 (Docket No. 50). The court will defer ruling on this motion until the next status conference which is scheduled for August 19, 1992.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, et al., Defendants. | ) | CASE NO 4:91 CV 2016 MEMORANDUM OPINION (Filed Jul 2, 1992) |

## I. INTRODUCTION

Plaintiffs bring this civil rights action under numerous statutory and constitutional provisions against the Village of Sebring (Sebring), Village of Sebring council members and the Village Manager, the Community Program Loan Trust, Shawmut Bank, General Electric Capital Corp. and Farmers Home Administration.[1] Plaintiffs are residents and/or landowners in Mahoning County Ohio, and currently receive water service from the Village of Sebring. They claim that the Village council's ordinance which provides for water service to those outside the village limits only upon the landowners' annexation of the land to Sebring violates their constitutional rights.

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[1] Plaintiffs seek relief under the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and 42 U.S.C. §§ 1983, 1985.

Defendants have filed a number of dispositive motions. Defendants J. Michael Pinkerton, James R. Conny, John W. Smith, Douglas L. Eaton, James V. Daniels, Alan C. Flowers and Joseph E. Igro (council members) move for judgment on the pleadings on the basis of legislative or qualified immunity (docket No. 39). Plaintiff has filed a response (docket No. 51), and defendants have filed a reply (docket No. 61).

Defendants Community Program Loan Trust, Shawmut Bank, and General Electric Capital Corp. (Trust defendants) and the United States Department of Agriculture, Farmers Home Administration (FmHA), have moved for dismissal under Fed. R. Civ. P. Rule 12(b)(6) (Docket No. 42 and No. 47). Plaintiff filed one memorandum in opposition addressing both motions (Docket No. 66).[2]

For the reasons that follow, defendant council members' motion for judgment on the pleadings is granted. Trust defendants' and FmHA's respective motions for dismissal are granted as well.

## II. FACTUAL BACKGROUND

Prior to 1930, Sebring contracted with a private company to service the water needs of its residents. In the early 1930's, Sebring purchased a water treatment plant and operated it, providing service to the residents of Sebring as well as certain individuals living outside the village limits in areas adjacent to the village.

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[2] While this Memorandum was filed late by more than thirty calendar days, it was considered by the Court.

In the late nineteen seventies (1970), it became apparent that the water treatment plant was eroding and in need of repair. To finance the restoration project, Sebring obtained a farm loan for $3,575,000.00 from Farmers Home Administration (FmHA), an agency of the United States Department of Agriculture. In return, Sebring issued a low interest bond to the FmHA, payable over a forty year period.

FmHA purchased the bond pursuant to the Consolidated Farm and Rural Development Act (the Act). 7 U.S.C. § 1921, et seq. The purpose of the Act is to provide for "the conservation, development, use, and control of water, and the installation or improvement of drainage or waste of water . . . primarily serving farmers, ranchers, farm tenants, farm laborers, and other rural residents." § 1926(a)(1).

In order to secure the loan, Sebring was required to pass certain legislation including a Loan Resolution which outlined the manner in which the village was to repay the loan, provided for payment in the event that Sebring defaulted on the loan, and created and granted vested water rights to landowners within the service area. The language of the Loan Resolution was taken from FmHA No. 442-47[3]. Specifically, the applicable provision of the Loan Resolution, adopted by Sebring, required Sebring to:

> provide adequate service to all persons within the service area who can feasibly and legally be serviced . . . Upon failure to provide services

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[3] The language is also cited at 7 C.F.R. § 1942(n)(2)(vii).

> which are feasible and legal, such person shall have a direct right of action against the association or public body.

On September 1, 1987, the FmHA sold its interest in the bond to defendant Community Program Loan Trust 1987A (the Trust), a business trust, pursuant to the Omnibus Budget Reconciliation Act of 1986, which called for a reduction in the federal deficit through the sale of certain loans. Defendant Shawmut Bank was appointed Trustee of the Trust. Under the Trust Agreement, defendant General Electric Capital Corporation (GECC) is responsible for the collection and disbursements of the annual payments of principal and interest by Sebring. (Hereinafter, defendants the Community Program Loan Trust, GECC, and Shawmut Bank will collectively be referred to as "the Trust defendants.")

On November 26, 1990, the council passed an Ordinance[4] which prohibits the extension of Sebring water and sewer utility services outside of the corporate limits of Sebring to any new customers, and requires current extra-territorial customers of Sebring water and sewer utility services residing in Mahoning County, Ohio to annex to Sebring within six (6) months of the effective date of the Ordinance. This Ordinance proposed to enforce its provisions by disconnecting water and sewer services to currently served parcels located in Mahoning, [sic] County that are not timely annexed. Complaint at 50.[5]

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[4] Resolution 1477-90.

[5] Following the passage of the Ordinance, a series of Referendum Petitions were filed followed by the passage of subsequent Emergency Ordinances. On November 5, 1991 Ordinance No. 1477-90 was passed at the municipal general election.

Plaintiffs claim that this provision does not apply to all extra-territorial parcels, but rather only to those located in Smith Township in Mahoning County.

## III. DISCUSSION

At the outset, the court notes that in ruling on a motion to dismiss, it " 'must consider the pleadings and affidavits in a light most favorable to the plaintiff." *Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981) (citations omitted). Also, all allegations should be taken as true. *Collins v. Nagle*, 892 F.2d 489 (6th Cir. 1989); and *Sosa v. Coleman*, 646 F.2d 991 (5th Cir. 1981).

In *Conley v. Gibson*, 355 U.S. 41 (1957), the Court set out the test for weighing the sufficiency of a 12(b)(6) motion. The Court stated:

> [i]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

*Id.* at 45-46. Under this liberal test, "[f]ew complaints . . . become subject to dismissal." Wright and Miller, § 1357.

Further, courts have consistently held that a motion for judgment on the pleadings is to be evaluated under the same standard as a motion to dismiss. *Bloor v. Carro, Spanbock, Londin, Rodman and Fass*, 754 F.2d 57 (2nd Cir.

1985). With these considerations in mind, the court evaluates the parties' various motions.

A. Judgment on the pleadings based on legislative immunity.

The individual council members move for judgment on the pleadings claiming that their action in drafting and passing the ordinances in question was legislative in nature, entitling them to absolute immunity. The court finds that the council's enactment of Ordinance No. 1447-90 was not a legislative act.

Traditionally, absolute immunity from suit was reserved for employees performing judicial functions and federal employees performing legislative functions. *Stump v. Spuekman,* 435 U.S. 349 (1978); and *Eastland v. United States Servicemen's Fund,* 421 U.S. [illegible]1 (1975). In *Tenney v. Brandhove,* 341 U.S. 367 (1951) *reh. den.* 342 U.S. 843 (1951), the Court held that state legislators enjoy absolute immunity for their legislative activity.[6] Absolute immunity was extended to state legislators for actions taken in their legislative capacity in *Lake County Estates. Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979). While the United States Supreme Court has yet to address the issue, at least eight circuit courts, including the Sixth Circuit, have extended absolute legislative immunity to local legislators for actions taken in their legislative capacity. *Haskell v. Washington Township,* 864 F.2d 1266

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[6] The *Tenney* Court referred to protected conduct as that which was in the legislator's "sphere of legitimate activity." *Id.* at 376.

(6th cir. 1988); *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983); and *Kuzinich v. County of Santa Clara*, 689 F.2d 1345(9th Cir. 1982).

In determining whether a defendant is entitled to absolute immunity, the court must look to the conduct engaged in, rather than the position held. *Marrero v. City of Hialeach*, 625 F.2d 499, 508 (5th Cir. 1980) *cert. denied*, 450 U.S. 913 (1981) ("it is the official *function* that determines the degree of immunity required, not the *status* of the acting officer.") (emphasis in original). Thus, the relevant question is whether drafting and enacting the ordinances in question can be considered legislative conduct.

The court in *Haskell* noted that it is often difficult to determine whether a local legislator's conduct is legislative, executive, or administrative in nature. *Id.* at 1278. To assist the court in classifying the type of conduct, the *Haskell* court adopted two tests first advanced in *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984).

> The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts", such as "generalizations concerning a policy or state of affairs", then the decision is legislative. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on the particularity of the impact of the state of action." If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals and affect[s] them differently from others," it is administrative.

In *Cutting*, the City's Planning Board passed a resolution conditioning approval of plaintiff's subdivision on completion of a subdivision road rather than simply accepting a bond or mortgage on the property as a guarantee of the road's completion. Plaintiff brought suit alleging that the decision of the Planning Board was motivated by racial animus towards the plaintiff's purchasers, all of whom had Italian surnames. The court ruled that defendant members of the Planning Board were not entitled to legislative immunity because their conduct in passing the resolution was administrative in nature. In arriving at this conclusion, the court noted that the resolution did not advance a general policy, but rather was directed against one individual, namely the plaintiff.

Similarly, the action taken by the Village of Sebring Council must be considered administrative in nature. Defendants notes [sic] that the passage or vetoing of ordinances which articulate general policy are generally considered legislative acts. *Baytree of Inverray Realty Partners v. City of Lauderhill*, 873 F.2d 1407, 1409 (11th Cir. 1989). In this case, however, the ordinances do not articulate general policy because they allegedly do not apply to all those receiving Sebring water service outside the corporation limits. Plaintiffs allege in their complaint, and this court must accept as true for the purposes of a motion for judgment on the pleadings, that the ordinances only affect customers living in Smith Township in Mahoning, [sic] County. According to plaintiffs, those living in Knox Township, Columbiana County, Ohio, or in the Village of Beloit, Mahoning County are not affected by the legislation. Because the ordinances do not treat all extraterritorial utility customers alike, but rather seeks

out for special treatment those living in Smith Township in Mahoning, [sic] County, the passage of such legislative [sic] is an administrative act. Consequently, defendant council members are not entitled to absolute immunity for their conduct associated with the passage of the water service related ordinances.

1. Qualified immunity.

In the alternative, the defendant council members argue that they are entitled to qualified immunity. In addition to absolute immunity for legislative and judicial acts, the court has also recognized a more limited immunity for officials performing executive or administrative functions. This limited immunity, known as qualified immunity, provides:

> government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.

*Anderson v. Creighton*, 107 S.Ct. 3034, 3438 (1987). This test approaches immunity from an "objective legal reasonableness" standard. Since the advent of this test, courts no longer look at the subjective intent of the official, but rather inquire as to whether "the conduct complained of constitute[s] a clearly established violation of statutory or constitutional law at the time it occurred." *Ohio Civil Service Employees v. Seiter*, 858 F.2d 1171, 1174 (6th Cir. 1988). Under the *Anderson* "objective legal reasonableness" test, the plaintiff must first establish that

the right allegedly violated is clearly established. Having proven this, the burden shifts to the defendant to demonstrate that the reasonable official would not have recognized that his conduct violated that right. *Id.*

Defendants contend that plaintiffs have no clearly established right to continued water service provided by the Village of Sebring. *Fairway Manor, Inc. v. Bd. of Commrs. of Summit Cty.*, 36 Ohio St. 3d 85, 89 (1988) ("Municipally owned public utilities have no duty to sell their products, including water, to extraterritorial purchasers absent a contractual obligation.") Plaintiffs argue, however, that their right to continued water service was clearly established in paragraph 14 of FmHA's loan agreement No. 442-47[7], adopted by defendant Village of Sebring as Loan Resolution 575-81, which states that Sebring is to:

> provide adequate service to all persons within the service area who can feasibly and legally be served and to obtain FmHA's concurrence prior to refusing new or adequate services to such persons. Upon failure of the applicant to provide services which are feasible and legal, such personal [sic] shall have a direct right of action against the applicant organization.

The defendant council members acknowledge that they did not consult FmHA before passing the above mentioned ordinances. Defendants argue, however, that they were under no obligation to do so. In support of their position, the defendants also cite the language of the Loan Resolution:

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[7] Also cited at 7 C.F.R. § 1942(n)(2)(vii).

> The provisions hereof and the provision of all instruments incident to the making or the insuring of the loan, unless otherwise specifically providing [sic] by the terms of such instruments, shall be binding upon the association *as long as the bonds are held or insured by the Government.*

(emphasis added). According to the complaint, the loan was assigned to the Community Program Loan Trust 1987A, a business trust, on August 15, 1987. The Ordinances, however, were not enacted until November of 1990. Clearly, the bonds were no longer held or insured by the government at the time of the alleged unlawful conduct. Therefore, defendants argue, the terms of the loan are no longer binding upon Sebring and cannot create a protected property right.

The extra-territorial residents' right to continued water service was not created by the Loan Resolution, however, but rather by the Consolidated Farm and Rural Development Act. 7 U.S.C. § 1921 et seq. The language of the Loan Resolution was merely developed from the provisions of the Act. A review [sic] the Act, and the legislative history behind the statute, demonstrates Congress's intent to encourage development and improvement of existing water treatment facilities, and to insure water service to, among others, rural residents and farmers regardless of whom ultimately maintains possession of the bonds. *See Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311, 314 (7th Cir. 1989); and *Glennpool Utilities Auth. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1214 (10th Cir. 1988).

This intent to service the rural resident is further confirmed through the statute's legislative history. A Senate report prepared prior to passage of the statute explains that "[b]y including service to other rural residents, the cost per user is decreased and the loans are more secure in addition to the community benefits of a safe and adequate supply of running water." *Jennings Water, supra* at 315, quoting S. Rep. No. 566, 87th Cong. & Admin. News 2243, 2309.

As further evidence of the congressional intent to service rural extra-territorial residents, one need only to look to the numerous decisions holding that under § 1926(b) a municipality may not use "inclusion" or "annexation" as a means of circumventing the rights of those associations that have received FmHA funding to provide water service to those within the association's water district. *Jennings Water, supra.* at 314-415; and *Glenpool, supra.* at 1214.[8]

The FmHA loaned the money to Sebring and accepted Sebring's bond in return pursuant to the provisions of the Act. In doing so, Sebring created a right vested in extra-territorial residents in Mahoning County to continued water service. Had Sebring not agreed to extend this right to the plaintiffs, and others similarly situated at the time of the loan, the monies would not have been forthcoming from FmHA. Having created that

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[8] *Jennings Water* and *Glenpool* were cases where instead of providing a municipality with funds to develop and maintain water and waste facilities, the money was given to associations. These associations are granted exclusive rights to service the water needs of those within their water district boundaries.

right and having received the funds from FmHA, Sebring cannot now eliminate the very right that was a prerequisite to receiving the money from the federal government. To allow Sebring to do so would be to frustrate the very purpose of the Act. Thus, the court holds that pursuant to the Act, and public policy behind the Act, plaintiffs have established the existence of a clearly established right.

Having found an alleged violation of a clearly established right, the court must address the second prong of the qualified immunity test, and determine whether a reasonable officer would have realized that his conduct violated this particular clearly established right. While the legislative intent behind the Act is clear, the court acknowledges that the Loan Resolution that the individual defendants voted for and adopted contained specific language that seemed to dissolve the Village's responsibility upon a sale of the bond. As a result, the court holds that a reasonable official would not have necessarily realized that the passage of the Village Ordinances in question would violate the extraterritorial residents right to continued water service. The court grants the individual defendants qualified immunity, and dismisses them from this lawsuit.

B. FmHA's motion to dismiss.

Defendant FmHA moves for dismissal pursuant to Rule 12(b)(6). No response was filed by plaintiffs. Because the court finds that plaintiffs have failed to set out a cause of action against FmHA, defendant FmHA's motion to dismiss is granted.

In their complaint, plaintiffs allege that defendant FmHA breached its duty to protect plaintiffs' rights to continued water service provided by Sebring. As previously mentioned, the Loan Resolution requires Sebring to create and protect the water rights of customers that are within the service area, even if they are outside the village limits. Further, the Loan Resolution provides for a direct cause of action against Sebring to enforce a customers' rights to water service. The Loan Resolution does not, however, obligate FmHA to enforce the water rights.

Even if FmHA did owe plaintiffs some obligation to protect their property rights to water service, that right was extinguished when FmHA sold its bonds to Community Program Loan Trust 1987A (the Trust) in 1987. FmHA is not a party to the present loan agreement between Sebring and the Trust, and therefore lacks any privity of contract to the very agreement that plaintiffs claim establishes their right to continued water service.

In the alternative, plaintiffs allege that FmHA's duty to protect their water rights can be derived from public policy as evidenced by the Consolidated Farm and Rural Development Act. (Complaint par. 71). The Act was passed to revise and consolidate the statutory authority of the Secretary of Agriculture to make and insure loans to improve or develop water and sewer systems. 7 U.S.C. § 1921. The FmHA does not directly provide water services to residents, nor does it design or build water treatment facilities. FmHA's role is limited to insuring financing for such projects. As such, public policy does not require FmHA, itself, to protect water rights.

Additionally, FmHA cannot be said to be a necessary party because the plaintiffs can obtain relief, namely the continuation or reinstatement of water services from Sebring, without their presence; and since FmHA has divested itself of any interest in the bonds at issue, it has no interest to protect. *See Marshall v. Local Union 20. International Brotherhood of Teamsters, etc.*, 611 F.2d 645 (6th Cir. 1979). Defendant FmHA has no interest in this case and is not a necessary party, and, therefore, must be dismissed from this case.

C. Motion to dismiss the Trust defendants.

The Trust defendants also move for dismissal pursuant to Rule 12(b)(6). In support of their motion, the Trust defendants claim that they owe no duty under the Loan Resolution or the Consolidated Farm and Rural Development Act to enforce plaintiffs' rights against Sebring.

Like FmHA, plaintiffs allege that the Trust defendants breached their collective duty to protect plaintiffs' right to continued water service. Since the court has already determined that the FmHA owed no duty to plaintiffs to enforce their water service rights, the Trust defendants, as assignees, owe no similar right. *Union Savings & Loan Co. v. Cook*, 127 Ohio St. 26, 30 (1933) (a third party beneficiary "acquires no greater rights than are set forth in the agreement.")

Further, even if FmHA did owe plaintiffs the duty of protecting their water rights, the Trust defendants did not assume this obligation. There contains no language in any of the bond agreements or supplemental agreements that

would suggest otherwise. The Trust acquired its interest in the Sebring bond pursuant to an Assignment, dated September 4, 1987. (Plaintiffs' Preliminary Injunction Exhibit G). The Assignment specifically states that the Trust acquired all rights owned by FmHA, but did not include a delegation of FmHA's duties.

Plaintiffs also claim that public policy imposes a responsibility upon the Trust defendants to protect water rights. Since the court found that public policy did not mandate that FmHA protect water rights, it also finds that its assignees are not required to do so. Further, even if public policy did dictate that FmHA was under an obligation to protect water rights, this extracontractual governmental duty derived from the Act, would not have been transferred to subsequent private bond holders.

Also, for the same reasons defendant FmHA is not a necessary party, the Trust defendants are likewise not necessary parties. As such, there is no reason for them to remain in the suit, and consequently, the Trust defendants' motion for dismissal is granted.

## IV. CONCLUSION

For the foregoing reasons, defendant council members' motion for judgment on the pleadings on the basis of qualified immunity, and the government's motion to dismiss are granted. Also granted are the defendants Community Program Loan Trust 1987A, Shawmut Bank, N.A., and General Electric Capital Corporation's motions to dismiss. The Village of Sebring remains a party defendant to this dispute, and plaintiffs' claims for both compensatory and injunctive relief are still viable against it.

The issue of attorney fees also survives the resolution of the aforementioned motions.

IT IS SO ORDERED.

/s/ David D. Dowd Jr.
David D. Dowd, Jr.
U.S. District Judge

Dowd, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, et al., Defendants. | CASE NO. 4:91 CV 2016 JUDGMENT ENTRY (Filed July 2, 1992) |

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendant council members' motion for judgment on the pleadings on the basis of qualified immunity, and the government's motion to dismiss are granted.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the motions of defendants Community Program Loan Trust 1987A, Shawmut Bank, N.A., and General Electric Capital Corporation's to dismiss are granted.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

Dowd, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, Defendant. | CASE NO. 4:91 CV 2016 ORDER (Filed July 20, 1992) |

The supplemental motion of the defendant The Village of Sebring to delay responding to plaintiffs' discovery requests and for a stay of discovery is denied. This case is scheduled for trial for the two-week period beginning September 21, 1992. The Court does not intend to delay the trial. While the Court has granted the defendant Village of Sebring the opportunity to brief its motion for judgment on the pleadings or summary judgment, the Court is of the view that the motion will fail. It is possibie the Court will change its mind but a stay of discovery in view of the trial date only two months away is ill advised. Consequently, the motion is denied in its entirety and the Village should proceed promptly to respond to the outstanding discovery requests of the plaintiffs. The Court expects the responses to be filed no later than August 10, 1992.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

Dowd, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, Defendant. | ) | CASE NO. 4:91 CV 2016<br>ORDER<br>(Filed July 29, 1992) |

The defendant Village of Sebring has moved for an extension of the discovery period until September 15, 1992, (docket No. 78). This case is currently scheduled for trial on stand-by basis for the two-week period beginning September 21, 1992. The parties have already been provided with ample opportunity to prepare their respective cases, and the court will not allow the parties to conduct additional discovery right up to the eve of trial. Discovery is closed and this case will go forward during the trial period starting September 21, 1992. The defendant's motion is denied.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

Dowd, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, Defendant. | ) | CASE NO. 4:91 CV 2016<br>ORDER<br>(Filed Aug. 6, 1992) |

The court has before it defendant Village of Sebring's motion for an enlargement of the discovery period until August 31, 1992, in order to allow the Village to take additional depositions to prepare a response to the plaintiffs' recently filed summary judgment motion, (docket No. 83). This represents the Villages' third request for an extension of the discovery period in the last three weeks. The two prior requests were denied, (docket No. 74 and docket No. 82).

The court is of the opinion that the Village has been provided ample opportunity to conduct discovery. This case is scheduled for a motion hearing on the two pending dispositive motions on August 14, 1992. Should the case survive summary judgment, it is scheduled for trial on stand-by basis for the two week period beginning September 21, 1992. As the court has made clear in prior orders, the court will tolerate no further delays, and anticipates that this case will proceed as scheduled.

Defendant's motion for an enlargement of the discovery period is denied.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

Dowd, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, Defendant. | ) | CASE NO. 4:91 CV 2016<br>ORDER<br>(Filed Aug. 14, 1992) |

The court has before it defendant Village of Sebring's ("Sebring") motion for judgment on the pleadings, (docket No. 65) and plaintiffs' motion for summary judgment, (docket No. 81).[1] On August 14, 1992, the court entertained oral arguments on the pending motions. After hearing the arguments from counsel, which spanned approximately two hours, the court is of the view that this case cannot be resolved on motions and must be tried. Consequently, and for reasons more fully set out in open court, the court denies both defendant Sebring's motion for judgment on the pleadings, and plaintiff's motion for summary judgment. This case has previously been scheduled for trial by jury on a stand-by basis for the one week period beginning September 21,

[1] Docket number 81 represents plaintiffs' response to Sebring's motion for judgment on the pleadings, as well as its own motion for summary judgment. Sebring has also filed a reply to its own motion and a response to plaintiffs' motion for summary judgment consolidated into one filing which, as of the date of this Order, has yet to be docketed.

1992, and will remain so scheduled. The status conference scheduled for August 19, 1992 at 12:00 p.m. is cancelled.

IT IS SO ORDERED.

/s/ David. D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

Dowd, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, Defendant. | ) | CASE NO. 4:91 CV 2016<br>ORDER<br>(Filed Oct. 13, 1992) |

On September 29, 1992, after a five day jury trial, the Court directed a verdict for the plaintiffs on the issue of liability, and submitted the issue of damages to the jury for determination. The jury returned a judgment of $55,600 against the Village.

In directing the verdict on the issue of liability, the Court reserved the right to file a written opinion at a later time. The Court would like to rule on the issue of attorney fees at the same time it publishes its Memorandum Opinion in support of its verdict. As such, the Court grants counsel for the plaintiffs leave until October 19, 1992 to submit their application for attorney fees. Defense counsel will have ten (10) days from the receipt of the application in which to respond.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, Defendant. | ) | CASE NO. 4:91 CV 2016<br>MEMORANDUM OPINION<br>(Filed Dec. 29, 1992) |

## I. INTRODUCTION

Plaintiffs, as extra-territorial water customers of the defendant Village of Sebring, brought this action[1] in October of 1991 seeking injunctive relief and, in some cases, compensatory damages.[2] The litigation commenced

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[1] Plaintiff also brought suit against the Village of Sebring council members and the Village manager; the Community Program Loan Trust, the purchaser of the bond; Shawmut Bank, the trustee of the Trust; General Electric Capital Corporation, the executor of the loan; and Farmers Home Administration, the grantor of the loan. These defendants were each granted summary judgment in the Court's July 2, 1992 Memorandum Opinion.

[2] While all eighteen plaintiffs sought injunctive relief, namely guaranteed continuing water service from Sebring, only eight plaintiffs sought money damages. Roland Kendrick and Judy Costello claimed that they were unable to sell their homes because of Sebring's decision to deny water service to new buyers living outside the Village limits absent an agreement to annex their land. Mark and Carla Wayne laid all of the necessary pipes and installed a tap and paid the "tap in" fee but were

as a reaction to Village of Sebring's policy of eliminating water service to the extra-territorial customers such as the plaintiffs unless they agreed to sign annexation petitions that would have the effect of annexing their lands to the Village of Sebring.

After the complaint was filed, the parties entered into agreement for the resumption or continuation of water service pending the outcome of the litigation.[3]

A trial by jury was conducted over a five day period.[4] At the conclusion of the trial, both sides moved for directed verdicts. After hearing the testimony in this case, this Court determined that the issue of liability was one that was a question of law rather than a question of fact. As a result, the Court removed the issue of liability from the jury, and directed a verdict for the plaintiffs. The issue of damages, alone, was submitted to the jury.

## II. FACTUAL BACKGROUND

Prior to 1930, Sebring contracted with a private company to service the water needs of its residents. In the

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never provided with water service. Jeffrey and Nancy Stuchell claimed that they were also denied water service. Finally, Bret and Brenda Smith claim that they had been receiving water service from Sebring, but that it was eventually discontinued causing them to go without water service for eight months. The facts surrounding each plaintiff's claim for damages will be discussed in detail *infra*.

[3] The Consent Order was signed by the parties on November 11, 1991, (Docket No. 9).

[4] Testimony was heard on September 23, 24, 25, 28, and 29, 1992.

early 1930's, Sebring purchased a water treatment plant and operated it, providing service to the residents of Sebring as well as certain individuals living outside the village limits in areas adjacent to the Village.

In 1952, Sebring entered into a twenty (20) year water service contract with the Maple Ridge Water Association. The Maple Ridge Water Association, comprised of seventy (70) residents living in Smith Township, in Mahoning County, Ohio, promised to finance and construct the necessary water lines to hook into Sebring's water system. In exchange, Sebring promised to provide the members of the Water Association with water service for twenty years at the Association members' expense. Further, the pipes paid for and installed by the Association became the immediate property of the Village of Sebring.

In the late nineteen seventies (1970), it became apparent that the water treatment plant was eroding and in need of repair. To finance the restoration project, Sebring obtained a farm loan for $3,575,000.00 from Farmers Home Administration (FmHA), an agency of the United States Department of Agriculture.[5] In return, Sebring issued a low interest bond to the FmHA, payable over a forty year period.

FmHA purchased the bond pursuant to the Consolidated Farm and Rural Development Act (Act). 7 U.S.C. Sec. 1921, *et seq*. The purpose of the Act is to provide for "the conservation, development, use, and control of water, and the installation or improvement of drainage or

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[5] Sebring had previously applied for a partial grant and a partial loan. This initial application was denied.

waste of water . . . primarily serving farmers, ranchers, farm tenants, farm laborers, and other rural residents." Sec. 1926(a)(1).

In order to secure the loan, Sebring was required to pass certain legislation including a Loan Resolution which outlined the manner in which the Village was to repay the loan, provided for payment in the event that Sebring defaulted on the loan, and created and granted vested water rights to landowners within the service area. The language of the Loan Resolution was taken from FmHA No. 442-47.[6] Paragraph fourteen (14) of the Loan Resolution required Sebring to:

> provide adequate service to all persons within the service area who can feasibly and legally be serviced . . . Upon failure to provide services which are feasible and legal, such person shall have a direct right of action against the association or public body.

On September 1, 1897 [sic], the FmHA assigned its interest in the bond to Community Program Loan Trust 1987A, a business trust, pursuant to the Omnibus Budget Reconciliation Act of 1986, which called for a reduction in the federal deficit through the sale of certain loans. Following the 1987 assignment of the bond, the federal government neither owned, nor guaranteed payment of the bond.

On November 26, 1990, the council passed an Ordinance[7] which prohibited the extension of Sebring water and sewer utility services outside of the corporate limits

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[6] The language is also cited at 7 C.F.R. Sec. 1942(n)(2)(vii).

[7] Resolution 1477-90.

of Sebring to any new customers, and required current extra-territorial customers of Sebring water and sewer utility services residing in Mahoning County, Ohio to annex to Sebring within six (6) months of the effective date of the Ordinance. This Ordinance proposed to enforce its provisions by disconnecting water and sewer services to currently served parcels located in Mahoning, [sic] County that were not timely annexed.

Ohio law with respect to the effective date of municipal ordinances provides that an ordinance does not become effective until thirty (30) days after passage and if, in the intervening time, a lawful referendum petition is filed, the ordinance does not become effective until a referendum election is conducted. O.R.C. § 731.29 and O.R.C. § 731.30. Resolution 1477-90 was subjected to the referendum process. The referendum election was not conducted until the November 1991 general election, after this case had been filed and temporary injunctive relief granted. As a consequence the municipal policy as set forth in Resolution 1477-90 was not a lawfully adopted policy of the Village. Nevertheless, after the adoption of Resolution 1477-90 and prior to the commencement of this action, the Village through its officials engaged in practices that had the effect of carrying out the policy of Resolution 1477-90. In sum, the Village refused to provide water service to some of the plaintiffs, and as to other plaintiffs, refused to allow for the continuation of water service in the event of a sale of the property.

Plaintiff Roland Kendrick was receiving water service from Sebring when he attempted to sell his home. He had located an interested buyer when he received a letter

from Sebring's law department informing him that if he chose to sell his home, the purchaser would have to agree to annex the property to Sebring in order to receive water service. Kendrick claims this annexation policy lowered the property value of his home, and inhibited his potential buyer's ability to obtain financing. Ultimately the individual interested in purchasing the home backed out of the deal, and Kendrick sued for loss of the bargain.

Like Kendrick, plaintiff Judy Costello claims that Sebring's refusal to transfer water rights upon sale of homes located outside of the Village limits absent annexation frustrated her efforts to sell her home. Costello claims that because she was unable to sell her home, she was forced to incur the cost of maintaining two homes, and sued to recover that cost.

At their own expense, Mark and Carla Wayne installed all of the pipes necessary to tap into Sebring's water lines, and paid the tap in fee.[8] Sebring refused, however, to furnish the property with water. As a consequence, the Waynes were unable to obtain the financing necessary to build a home on the property.

Jeffrey and Nancy Stuchell lost their home to fire. Prior to the fire, the couple had enjoyed water service provided by Sebring. After the fire, the Stuchells purchased a mobile home and moved it on to the property. Sebring, however, refused to provide water service to the mobile home. The Stuchells had to transport water to their mobile home. They subsequently sold the mobile home at a loss.

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[8] The tap had been previously approved by the Village.

Bret and Brenda Smith purchased their home just prior to the enactment of Resolution 1477-90, and began receiving water service from Sebring. Without any notice, the Smith's returned home one day to find Sebring employees digging up the water pipes in their backyard. As a result of Sebring's actions, the Smith's went without water on their property for eight (8) months before they finally drilled a well to meet their water needs.

## III. DISCUSSION

Plaintiffs claim that the failure to provide continuing water service or the imposition of conditions upon the right to enjoy continuing water service by Sebring violates 42 U.S.C. § 1983 which provides that any citizen may seek redress in this Court, by way of damages or injunctive relief, against any person or persons who, under color of any state law or custom, subjects such citizen to the deprivation of any rights, secured or protected by the Constitution or laws of the United States. *Parratt v. Taylor,* 451 U.S. 527 (1981), *overruled on other grounds, Daniels v. Williams,* 474 U.S. 327 (1986). A plaintiff must demonstrate both conduct under color of state law and the deprivation of a right secured by the Constitution or a federal statute or law. *Board of Regents v. Roth,* 408 U.S. 564 (1971).

### A. Due Process.

Plaintiffs first claim a § 1983 violation as a result of the deprivations of their rights under the Due Process Clause. The Due Process Clause protects individuals

property interests from arbitrary or unlawful governmental deprivation. "A basic principle of due process under the fourteenth amendment is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' " *Chernin v. Welchans*, 844 F.2d 322 (6th Cir. 1988) *quoting Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 313, 70 S.Ct. 652, 656-57 (1950). The notice must be such that it is reasonably calculated to "appraise interested parties of the pendency of the [governmental] action." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1977). Further, the United States Supreme Court has consistently held that the government must provide *some* kind of hearing where an individual can challenge the deprivation in a "meaningful" manner. *Armstrong v. Manzo*, 380 U.S. 545, 522, 82 S.Ct. 1187, 1191 (1965). *See also Memphis Light, supra;* and *Chernin, supra.*

Plaintiffs set out to prove at trial that in failing to provide continued water service, or refusing to transfer water rights, the Village, acting under color of state law, deprived them of a constitutionally protected right without proper notice or a meaningful opportunity to be heard; thus, violating their fourteenth amendment due process rights.

Two of the plaintiffs were provided with some form of notice. Kendrick and Costello each received a letter from the Village informing them that their water rights would not be transferred to subsequent purchasers absent an agreement to annex the property.

Several plaintiffs, however, were given no advance notice that their water service would be discontinued.

Mark and Carla Wayne had already obtained tap in authorization from Sebring, and paid the tap in fee, before Sebring informed them that they would not receive water service. Bret Smith testified that he arrived home from work one afternoon to find Sebring employees digging up the water pipes in his backyard. He stated under oath that neither he nor his wife, Brenda, were provided with notice prior to this destructive invasion.

Further, none of the plaintiffs were provided an opportunity to challenge the application of the Village's policy to their property. Plaintiffs claim that conduct such as this, absent notice and/or an opportunity to be heard, violated their due process rights.

1. Constitutionally protected right.

At the outset of any due process analysis, the court must find the deprivation of a constitutionally protected liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 572-78, 92 S. Ct. 2701, 2706-10 (1971). This property interest need not find its origin in the Constitution, so long as it is of the type, and of the magnitude contemplated by the Constitution. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975).

The Court finds that the plaintiffs enjoy a protected property interest in continued water service by reason of the provisions of the Consolidated Farm and Rural Development Act, as discussed in detail later in this Opinion, *infra*, pp. 17-24.

Even absent the Consolidated Farm and Rural Development Act, however, plaintiffs still have a protected

property interest in continued water service. In pre-trial briefs, and on its motion for a direct [sic] verdict, Sebring argued that the Village has no legal obligation to provide water service to extra-territorial residents. *Fairway Manor, Inc. v. Bd. of Commrs.*, 36 Ohio St. 3d 85, 89 (1988) ("Municipally owned public utilities have no duty to sell their products, including water, to extraterritorial purchasers absent a contractual obligation.")[9]

While it is true that a municipality need not provide water service to those living outside its boundaries, once it chooses to do so it cannot discontinue that service without due process. *Koger v. Guarino*, 412 F. Supp. 1375 (1976). Other courts have reached similar decisions with regards to other utilities such as gas and electricity. *DiMassimo v. Clearwater*, 805 F.2d 1536 (11th Cir. 1986); *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 156 (6th Cir. 1973); *Condosta v. Vermont Elec. Corp., Inc.*, 400 F. Supp. 358, 365 (D. Vt. 1975); *Donnelly v. City of Eureka*, 399 F. Supp. 64, 67 (D. Kan. 1975); *Bronson v. Consol. Edison Co. of N.Y.*, 350 F. Supp. 443, 447 (S.D.N.Y. 1972)[10]; and

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[9] Sebring relies heavily upon this case, but *Fairway Manor* dealt with contract rights between governmental entities – not individual customers, and therefore carries little weight in the present case.

[10] In explaining this right of entitlement, the court noted that:

> It has been clearly established that once the state has undertaken to provide a service to the public, be it welfare or unemployment benefits, drivers' licenses or tax exemptions, it must then comply with the requirements of due process before it can terminate access to such service or benefits in the case of any given individual. This is the concept of "entitlement",

*Hattell v. Public Service Co. of Colorado*, 350 F. Supp. 240 (D. Colo. 1972).

This right of "entitlement" was set out by the Supreme Court in *Goss v. Lopez, supra*, in the context of the expulsion of a student from public school without a pre-deprivation hearing. The Court explained that:

> [A]ppellants contend that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsion from the public school system. This position misconceives the nature of the issue and is refuted by prior decisions. The Fourteenth Amendment forbids the State to deprive any person of life, liberty or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizen to certain benefits. . . .
>
> Here, . . . appellees plainly had legitimate claims of entitlement to a public education . . . Having chosen to extend the right to an education to people of appellee's class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.

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which provides the individual with his only line of defense against arbitrary withdrawal by the state of his access to what, although initially not his right to demand, has become dependent upon. *Id.* at 447.

Plaintiffs are not new customers or individuals who would like water service from Sebring, but have never received service in the past. The evidence presented at trial established that most of the plaintiffs had been relying on Sebring for their water source for over thirty (30) years. Regardless of Sebring's initial obligation to provide water service to the plaintiffs, once it chose to do so it created in plaintiffs the constitutionally protected entitlement to continued service.[11]

2. Due Process Analysis.

Finding a constitutionally protected property interest, the Court must determine what process is due, and whether Sebring's system for instituting such a deprivation meets the strict requirements imposed by the Due Process Clause. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court provided the framework for analyzing due process claims:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal

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[11] *Compare Magnuson v. Hickory Hills*, 933 F.2d 562 (7th Cir. 1991), which held, without discussion, that continued water service is not a protected right.

> and administrative burdens that the additional or substitute procedural requirements would entail. *Id*, at 334-335.

In determining whether an interest rises to the level of requiring notice and a pre-deprivation hearing, the court is to look to the magnitude of the potential deprivation, and consider the suffering that will result from the deprivation. "The greater the potential suffering, the greater the need for a pre-deprivation hearing." *Chernin, supra* at 326. The court must also look to the length of the possible deprivation. *Fursari v. Steinberg*, 419 U.S. 379, 389, 95 S.Ct. 533, 539 (1975); and *Chernin, supra* at 327.

In measuring the risk of erroneous deprivation, the court examines the safeguards in place and the extent to which the process provided by the government will protect against wrongful deprivation. *Chernin, supra* at 327. A process that carefully guards against arbitrary deprivations will weigh heavily in favor of the government in the overall *Mathews* analysis. *Ransom v. Marrazzo*, 848 F.2d 398 (3rd Cir. 1988) (Publication of uniform service denial standards satisfied due process mandates).

In considering the final prong of the *Mathews'* test, the court must consider two types of governmental interests. "The first is the government's interest in the policy that the state action advances. The second is the government's interest in minimizing its administrative and fiscal burdens." *Chernin, supra* at 329, *citing Mathews, supra* at 335, 96 S.Ct. at 903. *See, e.g., Ransom, supra.* (City has a legitimate interest in recouping the cost of providing utility services); and *Koger, supra* (City of Philadelphia has an interest in the prompt and efficient collection of fees for water service).

Turning to the present case, it is clear that plaintiffs have a significant private interest in continued water service. "Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety." *Craft, supra* at 18. The Supreme Court in *Craft* recognized that the deprivation of water service for even short periods of time can result in much suffering and discomfort. *Id.* at 20. Other courts have echoed the sentiments expressed in *Craft. DiMassimo, supra;* and *Koger, supra.*[12]

The need for water service and the suffering that can result from its deprivation was evident from the evidence advanced at trial. There was testimony that some plaintiffs were forced to carry water from the homes of family and friends in order to remain in their own home. Still, others testified that they were forced to leave their homes altogether when the Village shut the water off.[13] Thus, it is evident that the plaintiffs have advanced a substantial private interest whose deprivation, even for a short period of time, can work a serious hardship.

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[12] The Koger Court held that:

> While termination of electrical power may not render a premises unfit for habitation, water is an absolute necessity of life and we cannot envision any more serious individual consequences than those which flow from its deprivation. *Id.* at 1388 (citations omitted).

[13] Also, plaintiffs Roland Kendrick and Judy Costello testified that all efforts to sell their properties were frustrated by the Villages' refusal to transfer continuing water rights to new landowners.

Balanced against the plaintiffs' private interest are the glaring inadequacies of the procedures inserted by Sebring to prevent erroneous deprivations. None of the plaintiffs were provided with any type of hearing where they could challenge Sebring's policy of denying water service absent an annexation agreement. Further, at least two of the plaintiffs, Bret and Brenda Smith, were not even provided notice prior to the termination of water service. At best, Sebring's only attempt at providing pre-deprivation due process was to send notices threatening termination of water services if the landowner did not annex his or her property to Sebring.

Further, the right to bring a lawsuit, such as this one, in a post-deprivation setting is insufficient to insure due process. Post-deprivation lawsuits are usually only acceptable substitutes for pre-deprivation hearings when the likelihood of serious loss is slight. *Craft, supra.*

Finally, the Court must consider Sebring's interest in increasing its tax base. Municipal employees testified that Sebring's annexation policy is critical to generating revenue sufficient to meet its water service costs. Sebring presented testimony that substantial repairs are needed on the pipes which currently supply water to Sebring's extra-territorial customers, and that it will cost approximately $590,000 to service plaintiffs and others similarly situated who wish to receive their water from Sebring in the future.

While the Court is mindful of the Village's need to raise revenue and meet costs and expenses, its need to require annexation is somewhat less pressing. Sebring is already receiving revenue from plaintiffs and other extra-

territorial customers in the form of surcharges. Plaintiffs do not challenge these surcharges, and have even expressed a willingness to pay higher surcharges in the future. Since the Village is already receiving money for the services it provides, its need to require annexation is dwarfed by the plaintiffs' interest in receiving this necessity of life. In view of the fact that procedural safeguards currently in place fail to offer adequate notice and a meaningful opportunity to be heard, plaintiffs are entitled to a directed verdict on their § 1983 action based on violations of the Due Process Clause.

B. Consolidated Farm and Rural Development Act.

Plaintiffs bring a second claim under § 1983, arguing that Sebring violated federal statutory law. Read broadly, plaintiffs' Complaint raises a claim under the Consolidated Farm and Rule [sic] Development Act. A municipality is only liable under § 1983 for violations resulting from its official policies and customs. *Monnell v. Department of Social Services*, 436 U.S. 658 (1978).

Sebring argued in pre-trial briefs and on motion for a directed verdict that the plaintiffs cannot show an unlawful policy that worked a constitutional deprivation because the Ordinance which mandated annexation in exchange for water service never went into effect. In reality, the presentation of the referendum petitions did not affect village policy. Rather, the Village, through its officials, has refused to transfer water service rights to property being sold outside the Village limits, has discontinued water service to people such as the plaintiff Stuchells, and has denied water service to certain extra-

territorial residents with pre-authorized taps. Charles Tieche, Sebring Village Manager, testified that, even absent Resolution 1477-90, it has been Sebring's policy to deny continued water service to extra-territorial customers absent annexation. The undisputed evidence presented at trial indicates that in denying continued water service to plaintiffs, and others similarly situated, Sebring acted pursuant to a custom or a practice. Municipal governments may be liable for customs or practices which cause constitutional violations, even though such a custom has not received formal approval from the official legislative body. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-482 n. 10 (1986). *See also City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988).

This policy or practice, plaintiffs claim, violated federal statutory law, invoking their right to bring a § 1983 claim. As the Court held in its July 2, 1992 Memorandum Opinion, the Consolidated Farm and Rural Development Act, from which paragraph 14 of the Loan Resolution was adopted, guaranteed the right to continued water service to all rural residents within the defined service area who can be legally and feasibly served. The Court finds that the plaintiffs have satisfied all three of the criteria contained in paragraph 14 of the Loan Resolution, thus bringing them in under the umbrella of the Consolidated Farm and Rural Development Act.

Plaintiffs offered the testimony of Marvin Alysworth, the Assistant District Director for the FmHA. He testified that in order to obtain a loan, an applicant must submit a proposed service area. Mr. Alysworth identified Plaintiff's Exhibit 5 as the map which Sebring submitted which outlined the proposed service area. It is beyond dispute

that this map represents the appropriate service area, and that all plaintiffs' properties are located in the service area.

The Court finds as a matter of law that it is both legal and feasible for Sebring to provide water service to the plaintiffs. It is legal as there is no statutory law which prohibits Sebring from supplying such service to the plaintiffs or those similarly situated. It is also feasible as such service has been provided to the plaintiffs in the past, and is currently being provided pursuant to the terms of the temporary restraining order issued by this Court. In sum, the Court rules that plaintiffs have satisfied the requirements laid out in the Loan Resolution, and are entitled to water service as a matter of law so long as the provisions of the Loan Resolution are in effect.

Sebring argues, however, that the provisions of the Loan Resolution ceased to carry legal effect when the bond was sold to the private trust, by virtue of the language in paragraph 15 of the Loan Resolution which states:

> The provisions hereof and the provision of all instruments incident to the making or the insuring of the loan, unless otherwise specifically providing by the terms of such instruments, shall be binding upon the association *as long as the bonds are held or insured by the Government.*

(emphasis added). Sebring argues that because the bond was sold to a private trust in 1987, the government neither holds nor insures it, and therefore the obligations set out in the Loan Resolution are no longer binding. The Court holds, however, that the obligation to provide

water service to the plaintiffs survived the sale of the bond.

1. Section 1926(b).

As previously held, the plaintiffs' right to continued water service was not created by the Loan Resolution, but rather by the Consolidated Farm and Rural Development Act. The language of the Loan Resolution was merely a product of the provisions of the Act. A review of the Act, and the legislative history behind the statute, demonstrates Congress' intent to encourage development and improvement of existing water treatment facilities, and to insure water service to, among others specifically listed, rural residents and farmers, regardless of which entity eventually owns the bonds and is entitled to payment by the Village. S. Rep. No. 566, 87th Cong. & Admin. News 2243.

Previous courts, in reviewing the legislative history behind the Act, have held that Congress, in providing for the obligation to serve rural and extra-territorial residents, intended to increase the number of users so that the cost per user would decrease, and a safe and clean water supply would be insured. *Jennings Water, Inc. v. City of North Vernon. Ind.*, 895 F.2d 311 (714 [sic] Cir. 1989) (A Senate report prepared prior to passage of the Act explains that "[b]y including service to other rural residents, the cost per user is decreased and the loans are more secure in addition to the community benefits of a safe and adequate supply of running water." *Id.* at 315, *quoting* S. Rep. No. 566, 87th Cong. & Admin. News 2243,

2309); and *Glenpool Utilities Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211 (10th Cir. 1988).[14]

In *Glenpool*, the court noted that §1926(b) was enacted as a means by which Congress could control the use of monies advanced to state and local governments for water systems. The court held that "[t]he conditions of section 1926(b) . . . serve as protection of federal funds advanced under the congressional spending power and pursuant to a national policy concerned with water management and rural populations." *Id.* at 1215. Also, in a report to Congress, there is language which indicates that the purpose of §1926(b) is to support the "very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities." U.S. Code Cong. & Admin. News, 87 Cong., 1961, Vol. 2, pages 2243 and 2309.

Additionally, the statutory language clearly indicates that Congress intended to insure water service to rural residents free from obligations imposed by municipalities that are not directly associated with the cost of that service. 7 U.S.C. §1926(b) states:

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[14] *Jennings Water* and *Glenpool* were cases where instead of providing a municipality with funds to develop and maintain water and waste facilities, the FmHA money was given to water associations. These associations are granted exclusive rights to service the water needs of those within their water district boundaries.

> The service provided or made available through any such association *shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body*, or by the granting of any private franchise for similar service within such area during the term of the loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event. (emphasis added).

As further evidence of the congressional intent to service rural extra-territorial residents free from restraints, one need only look to the numerous decisions holding that under 7 U.S.C. §1926(b) a municipality may not use "inclusion" or "annexation" as a means of circumventing the rights of those associations that have received FmHA funding to provide water service to those within the association's water district. *Jennings Water, supra* at 314-315; and *Glenpool, supra,* at 1214.

The basic theme running through the cases which examined § 1926(b) in the context of the rights of water associations that had received monies from the FmHA, is that the statute is to be given a liberal interpretation to protect the water rights of rural residents from municipal encroachment. *See Jennings, supra; Glenpool, supra; City of Madison, Miss. v. Bear Creek Water Ass'n,* 816 F.2d 1057 (5th Cir. 1987); *Pinehurst Enters. v. Town of Southern Pines,* 690 F. Supp. 444 (M.D.N.C. 1986); *Moore Bayou Water Ass'n v. Town of Jonestown,* 628 F. Supp. 1367 (N.D. Miss. 1986); and *Rural Dist. No. 3 v. Owasso Utilities Auth,* 530 F. Supp.

818 (N.D. Okla. 1979). This theme is applicable to cases, such as this, where the municipality is the recipient of the FmHA money. Congress has clearly stated, and past courts have correctly held, that FmHA monies are advanced specifically to benefit farmers and rural residents by providing them safe and clean water sources.

The Court's ruling rests on sound legal and policy related grounds. The FmHA loaned the money to Sebring and accepted Sebring's bond in return pursuant to the provisions of the Act. In doing so, Sebring created a right vested in the plaintiffs, among others, to continued water service. Had Sebring not agreed to extend this right to the plaintiffs, and others similarly situated at the time of the loan, the monies would not have been forthcoming from FmHA. In fact, beyond the Act's goal of insuring safe and clean water to rural residents, the FmHA required that Sebring demonstrate that it had 2,200 potential users before it was eligible for the loan. Since there were only 1,760 users in Sebring, the Village had to rely on extra-territorial residents to satisfy the base requirement.

The sale of the bond by the FmHA was not the establishment of a new congressional policy or a change in congressional intent with respect to the importance of the Act and its goal to provide safe and clean water to those living within or outside of city boundaries across the country. Congress ordered the sale of the bond to raise money in an attempt to balance the budget, and not to abandon rural residents.

Thus, the Court finds that the Act vested in plaintiffs the right to continued water service; service that runs with the land, and can be transferred from an individual

to a subsequent buyer. Further, the Loan Resolution clearly calls upon Sebring to insure that right and provide an avenue for redress if that right is not provided. Having created that right and having received the funds from FmHA, Sebring cannot now eliminate the very right that was a prerequisite to receiving the money from the federal government. To allow Sebring to do so would be to frustrate the very purpose of the Act. Thus, the Court finds for the plaintiffs on their § 1983 claim based on the Consolidated Farm and Rural Development Act, and directs a verdict in their favor.

C. Damages.

Having directed a verdict on the issue of liability, the Court submitted the case to the jury on the issue of damages only. The jury returned a total judgment against Sebring of $55,600.[15] In its instructions to the jury, the Court charged:

> The damages you award may include: (1) any costs or expenses reasonably incurred and/or (2) any discomfort and annoyance to the plaintiff and/or (3) costs of restoring water supply, if any.

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[15] Plaintiff Roland Kendrick was awarded $5,000, plaintiffs Mark and Carla Wayne received $10,000, Bret and Brenda Smith received $15,000, Jeffrey and Nancy Stuchell were awarded $13,600, and Judy Costello received $12,000.

The Village objected to this charge on the grounds that pain and suffering is not compensable under Ohio contract law.[16] Such a charge, however, is clearly appropriate under the circumstances presented in this case. Certainly relief for pain and suffering, or discomfort and annoyance, is recoverable for procedural due process violations. *Carvey* [sic] *v. Piphus,* 435 U.S. 247 (1977); and *Williams v. City of N.Y.,* 728 F. Supp. 1067 (S.D.N.Y. 1990).

Even absent the due process violation, such a charge is acceptable in light of the violation under the Act. Sebring is correct in noting that, as a general rule, damages arising from mental suffering resulting from a breach of contract are not recoverable. *Pullman Co. v. Wilett,* 27 OCC 649, *aff'd* 72 OS 690; and *Grill v. Abele Funeral Home,* 69 O App. 51 (1940). Plaintiffs argue, however, that this is an action sounding in torts rather than contracts, making it an appropriate case for a "pain and suffering" charge. *See, e.g., Binns v. Fredendall,* 32 O.S.3d 224 (1987); and *Paugh v. Hanks,* 6 O.S.3d 72 (1983).

While this case may not fit the traditional notion of a tort action, it similarly does not neatly fall into the category of contracts. Here, parties with equal bargaining power did not enter into a contract to buy and sell goods for consideration. Rather, by partaking of the benefits offered by a federal agency, namely a low interest loan, Sebring created in the plaintiffs a right to receive continued water service, a right a number of the plaintiffs had previously enjoyed, without any sort of contract, for over

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[16] It was Sebring's position that "discomfort and annoyance" was the equivalent of pain and suffering.

three decades. This right is not the creature of contract, but rather is an offspring of the Consolidated Farm and Rural Development Act. Here, as such, the failure to provide continued water service is not a breach of contract, but rather is a denial of a necessity of life guaranteed to the plaintiffs by federal law. Ohio courts have held that the pain and suffering that accompanies such a denial is compensable. *See eg. Cline v. American Aggregates Corp.*, 64 Ohio App. 503 (Franklin County 1989).

## IV. CONCLUSION

For the foregoing reasons the eighteen (18) plaintiffs are granted permanent injunctive relief in that the defendant Village of Sebring, its successors and assigns are permanently enjoined from discontinuing water service to the plaintiffs Mark Wayne, Carla Wayne, Roland Kendrick, Brent Smith, Brenda Smith, Robert Rouse, Jr., Sharon Rouse, Donald Stillion, Beverly Stillion, William Tuel, Marjorie Tuel, Claude Bailey, Margaret Bailey, Larry Hartley, Kathleen Hartley, Judy Costello, Nancy Stuchell and Jeffrey Stuchell, to the properties which they presently own within service area of the Village of Sebring for the purpose of supplying water so long as the plaintiffs, their successors and assigns, as to the property so situated, comply with all lawful rules and regulations of the Village of Sebring for the supply of water service.

The plaintiffs Roland Kendrick, Judy Costello, Mark and Carla Wayne, Jeffrey and Nancy Stuchell, and Bret and Brenda Smith will be granted judgment for compensatory damages consistent with the jury verdict.

## V. APPLICATION OF PLAINTIFFS' COUNSEL FOR ATTORNEY FEES PURSUANT TO 42 USC § 1988.

### A. Introduction.

Three attorneys represented the plaintiffs and seek an award of attorney fees and costs (Docket #130). Their application is opposed.

Karen D. Kendrick-Hands (Kendrick-Hands) requests an award of $103,124 based on a claim of 711.2 hours at an hourly rate of $145; Steve Edwards (Edwards) requests an award of $31,300.50 based on 284.55 hours at an hourly rate of $110.00 and Alfred Schrader (Schrader) requests an award of $2,730 based on 27.3 hours at an hourly rate of $100.00.[17]

Additionally, Kendrick-Hands claims costs in the sum of $5,509.37; Edwards claims costs in the sum of $4,518.18 and Schrader claims costs in the sum of $20.00.

The opposition of the defendant to the application raises issues of prevailing party, challenges the number of hours claimed and the hourly rate requested.

### B. Discussion of Applicable Law.

Despite defendant's argument, *Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied* 447 U.S. 911 (1980), read in conjunction with

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[17] The initial Schrader request failed to contain an hourly itemization. That omission has been corrected (Docket No. 145) and the Court finds that Schrader asserts a total of 41.55 hours of work, but that he has reduced it to a billing of 27.3 hours to avoid duplication.

42 U.S.C. § 1988, remains the starting point in determining an appropriate attorney fee award for the prevailing party in an action brought pursuant to 42 U.S.C. § 1983. *Northcross* requires a determination of a lode star figure which is calculated by multiplying the hours allowed times the determined hourly rate.

1. Determination of the Hourly Rate.

42 U.S.C. § 1988 authorizes the Court to allow the prevailing party " . . . a reasonable attorney's fee as part of the costs." *Blum v. Stenson*, ___ U.S. ___, 104 S. Ct. 1541 (1984) held that reasonable fees "are to be calculated according to prevailing market rates in the relevant community." Such a pronouncement is only the starting point as additional questions arise in considering the prevailing market rates. What is the size of the community? What rate is to be applied when an attorney from an area outside the community performs the services? Should the Court recognize the complexity of the action or conversely the simplicity of the case? Should the Court calculate what constitutes reasonable hours from the standpoint of the hourly rate granted counsel. If for instance the rate is higher, should the Court expect the rate to reflect the expertise of counsel and anticipate that the work to be accomplished in a given case will require less time. Should the Court consider the customary hourly rates charged by the attorney requesting fees for noncontingent services? If the attorney performing the work does not on a normal basis charge for non-contingent services, what factors should be applied? Should the persons who specialize in the litigation be entitled to a

greater rate because of their experience and knowledge in the field? In short, questions are numerous with respect to determining what constitutes prevailing market rates in the relevant community.

It is the Court's view that it should consider the complexity of the work, the community standards as best as they can be established respecting prevailing market rates, the attorney's experience, the attorney's expertise in the field, the manner in which the attorney has performed in the given case and the results obtained. The Court finds that affidavits submitted regarding attorneys' notions as to the amount of the relevant rates for Kendrick-Hands and Edwards are useful but not dispositive.

2. A Determination of the Number of Hours to be Allowed Where a Dispute Arises.

*Hensley v. Eckerhart*, 461 U.S. 424 (1982) teaches that the number of hours claimed should be reduced where the hours are not reasonably expended, or are excessive or relate to a case where only partial success was achieved. Moreover, *Hensley* teaches that where the documentation of the hours is inadequate, the Court may reduce the amount accordingly.

Two issues frequently arise with respect to the question of whether the hours are excessive. The first is factual. Did the attorney actually devote to the case the time claimed? Second, is the amount of time claimed excessive within the context of reasonableness? The first issue relates to the integrity of the attorney laying claim to the hours. It is a distasteful task for the district court to

question the accuracy of the records of an attorney claiming an allowance for fees. Presumably it is equally distasteful for opposing counsel to engage in such a questioning process. Appellate courts consistently suggest that attorney fee controversy should not become a form of satellite litigation unnecessarily expending the energies of the district court. However, such an occurrence is inevitable where there is a claim of opposing counsel that the hours claimed are excessive. In evaluating the claim of excessive hours, the district court should be mindful of the fact that the allowance of attorney fees under the provisions of 42 U.S.C. § 1988 is to reward the "private attorney generals" for their work done and to encourage them to undertake what may be unpleasant or difficult tasks. On the other hand, 42 U.S.C. § 1988 is not to be regarded as a windfall entitling some form of attorney fee gouging of the person determined to have been the non-prevailing party in a civil rights action. The district court is accorded discretion in determining the award, but *Hensley* instructs that the district court should "provide a concise but clear explanation of its reasons for the fee award." *Id.* at 437.

3. Prevailing Party Determinations.

*Hensley, supra,* teaches that where the plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee and that the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Nonetheless, *Hensley* provides that the district court is required to determine the extent of plaintiff's success and articulate

an explanation for the attorney fee award where issues of success are raised. In the case at hand, it is necessary that the Court examine the issue of total versus partial success to determine whether or not a reduction on the basis of only partial success should be entered.

4. Discounting the Lodestar Award Based Upon Only "Partial Success."

In calculating the discounting of a lodestar amount where the prevailing party achieved only "partial success," *Hensley, supra,* teaches that the fee award must be reduced by the number of hours spent on unsuccessful claims. Such a principle constitutes a guide to the district court, but the difficulty arises where the time keeping records of the counsel are such that it is difficult, if not impossible, absent concise records to identify with accuracy hours spent on successful claims versus unsuccessful claims. The district court has first hand knowledge to make such an accurate evaluation with respect to court room time, but the evaluation is very difficult as to contested out-of-court time which frequently constitutes the greater portion of the fee application.

5. Discounting for Duplication of Effort.

Duplication of effort has resulted in unnecessary hours being disallowed for such items as multiple lawyers attending depositions or hearings, reading and review time by multiple lawyers for informational purposes, travel time by multiple counsel to hearings, depositions, or meetings, and other repetitious time

expenditures. *See In Re Fine Paper Antitrust Litigation*, 751 F.2d 562, (3rd Cir. 1984).

6. Evidentiary Hearing Requirements.

*Blum v. Stenson, supra,* suggests an evidentiary hearing on the proper amount of fees is required when material facts are disputed such as the dispute over the number of hours claimed. The Manual for Complex Litigation states

> The nature and scope of the [fee] hearing to be held by the court will vary with the circumstances of the case. The determination of a fee award should not itself become major litigation. In many cases, the award can be made on the basis of the documentary materials furnished by the parties together with the judges' personal knowledge of the litigation. The parties, however, should be provided the opportunity for an evidentiary hearing whenever there are contested issues of fact.

Manual for Complex Litigation 2d § 24.13 (1985).

C. The Prevailing Party Issue.

The plaintiffs are clearly the prevailing party in this action. However, the defendant Village of Sebring argues that the lodestar award should be severely discounted for the "limited success" of the plaintiffs because its initial complaint joined a series of additional parties who were subsequently dismissed.

The primary goal of the plaintiffs in this litigation was to protect their right to continued water service with

Sebring and to obtain compensatory damages. That result has been achieved. However, the defendant should not be required to pay fees for the time devoted by plaintiffs' counsel in maintaining the [sic] their action against dismissed defendants. The Court will consider a reduction of the hours claimed from the standpoint of "lack of success," duplication, and excessive time in the context of reasonableness in Section D, *infra*.

D. The Challenge to the Hours Claimed.

Kendrick-Hands and Edwards have each filed a summary of the hours claimed on a day by day basis with a description of the work performed.[18]

The court has carefully examined the two summaries in an attempt to evaluate the applications. At the outset it should be noted that Mr. Edwards did not enter the representation of the plaintiffs until after the complaint had been filed. Prior to that entry, Kendrick-Hands had accumulated a substantial amount of time for which she requests compensation. Much of that time was devoted to research, preparation of briefs and proposed pleadings. The defendant's attack on the Kendrick-Hands application focuses on inadequate explanations for the time claimed, duplication and unreasonable amounts of time claimed.

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[18] The two summaries have been numbered item by item for reference purposes and attached as Appendix A (Kendrick-Hand) and Appendix B (Edwards).

It is helpful to the analysis to divide the requests of Kendrick-Hands and Edwards into the components of their separate applications as follows:

Kendrick-Hands:

| | |
|---|---|
| Pre-filing of complaint time: | 229.2 hours |
| Post Complaint-pre trial time: | 321.8 " |
| Trial time: | 95.5 |
| Attorney Fee Application Time: | 53.8 |
| Total | 700.3[19] |

Edwards:

| | |
|---|---|
| Post-Complaint-pre trial time: | 214.15 |
| Trial Time: | 58.7 |
| Attorney Fee Application | 11.7 |
| Total | 284.55 |

Schrader:[20]

The application of Kendrick-Hands for pre-complaint time is excessive. Some of the time was obviously devoted to consideration of the claims advanced against the defendants who were dismissed. Moreover, the total time claimed is itself patently excessive. Consequently, after review of the application, the hours to be allowed for the pre-filing of the complaint component is reduced by 50% to 114.6 hours.

The applications as they relate to post-complaint time to commencement of trial on September 23, 1992, comprise the bulk of the application and again there is the problem of time devoted to prosecuting the claims

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[19] The Kendrick-Hands application claims 711.2 hours, but the Court's addition, based on the separate components, results in a total of 700.3 hours.

[20] The Schrader fee statement is attached as Exhibit C.

against the dismissed defendants and duplication of efforts. After due consideration of the applications, the court reduces the requested post-complaint – pre-trial time by a factor of 25%.

A review of the docket reveals that the court was in trial for a period of approximately 35 hours. Those hours will be allowed in their entirety. There was no duplication of effort by the plaintiffs being represented by two lawyers during the trial. The court observes that the defendant was represented by three lawyers, all of whom participated during the trial. Kendrick-Hands claims an additional 60.5 hours during the days that marked the beginning of the trial to its conclusion while Edwards claims only an additional 23.7 hours for the same time period. The court finds that the Kendrick-Hands claim of an additional 60.5 hours during the progress of the trial is excessive and is reduced by ten hours.

Kendrick-Hands claims 53.8 hours for preparation of the attorney fee application. The court finds that amount of time to be excessive and reduces the allowable hours for the fee application on the part of Kendrick-Hands by 50% to 26.9 hours and the 11.7 hours claimed by Edwards are approved.

The Schrader application requests compensation for work done from October 7, 1991 through April 14, 1992. Some of the time was devoted to receiving and reviewing correspondence from other lawyers in the case. Schrader did assist in the preparation of the initial complaint and did preliminary work in connection with the obtaining of injunctive relief. Schrader also participated in the status call and attended a settlement conference in Cleveland

presided over at the Clerk's request by Assistant United States Attorney Annette Butler. The Court allows Mr. Schrader 15 hours at the requested rate of $100 per hour.

E. The Challenge to the Hourly Rate.

Kendrick-Hands, a 1980 Syracuse University Law School graduate, is a sole practitioner in Michigan. She was admitted to the practice of law in New York and Michigan in 1983. From 1981 to 1983 she was a law clerk for the late Honorable Phillip Pratt, United States District Court for the Eastern District of Michigan. She has taught in both University of Detroit Law School and Wayne State University Law School and has been active in environmental, municipal and administrative law in the State of Michigan. She entered the litigation on behalf of her father and plaintiff Roland Kendrick. She states that her hourly rate is $145 an hour.

Mr. Edwards is a 1979 graduate of the Ohio State University College of Law. He has been a sole practitioner in Columbus, Ohio since 1982. He asserts that he has tried approximately fifteen civil jury trials and done extensive work, both trial and appellate with regard to water rights under Ohio law. He claims that his hourly rate is $110 per hour.

The defendant challenges the rates requested, primarily on the basis that the hourly rates charged by Mr. Ward ($110 an hour) and Mr. Johnson ($85 an hour) for defense work in cases brought pursuant to 42 U.S.C. Section 1983 are considerably lower than the requests. The only lawyer in this case involved in the practice of

law in Mahoning County is Mr. Cardinal, the law director for the Village of Sebring. Neither Kendrick-Hands or Edwards practice law in the Northern District of Ohio on an on-going basis. While the rates claimed by Kendrick-Hands and Edwards are of some assistance, the Court is not bound by the requests. But for the relationship of Kendrick-Hands to her father, a plaintiff in this action, it is unlikely that either Kendrick-Hands or Edwards would have been involved in this litigation. The rates that Ward and Johnson charge their insurance company clients in § 1983 litigation is also of assistance, but not dispositive.[21] Of further relevance, is the apparent unwillingness of any lawyers from Mahoning County or the adjacent counties of Stark and Columbiana to assist the plaintiffs in this case where the eighteen plaintiffs were met with what appeared to the court to be a fairly intractable position on the part of the Village of Sebring as its officials were prepared to eliminate existing water service to existing customers living in the township, without regard to the hardship their annex-or-else policy would have on its customers. Kendrick-Hands and Edwards have offered affidavits of lawyers in their own locale supporting the rates requested. The establishing of a fair rate is highly subjective. However, the court has been about the process for ten years and relies in part on past decisions. Only recently the court participated on a three judge panel in a

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[21] The Court is aware of the fact that some law firms in the past decade, specializing in litigation, have chosen to discontinue representation of insurance companies, rather than inflate the hours claimed, because of the low hourly rates that insurance companies would pay.

Voting Rights Act case where attorney fees were in dispute and the per curiam opinion[22] included a footnote which reported on previous attorney fee allowances in cases handled by this Court as follows:

> In the Lorain school desegregation case (Case No. C79-1775), the court allowed local counsel for the plaintiff James Hardiman an hourly rate of $100 for work prior to 1980 and $125 an hour for work after 1985. Thomas Atkins, recognized nationally for his work in desegregation cases, was allowed $200 an hour; in *Giddings v. Tippel* (Case No. C87-2727A), a housing discrimination case in Akron, Mr. Ed Gilbert was allowed $100 an hour for out of court work and $150 an hour for in court work; in *Emery v. Cincinnati* . . . (Case No. C-1-88-0791), in the Southern District of Ohio, a case alleging illegal wiretaps by the Cincinnati Police Department, lead counsel Gene Mesh, a nationally recognized lawyer in the prosecution of class actions, was granted a fee of $200 an hour. In *Domalewski v. Boardman Local School District*, Case No. 4-89-CV1484, affirmed by an unpublished decision by the Sixth Circuit in its case nos. 91-3338 and 91-3363, a Title VII case involving sex discrimination in the Youngstown area, the court allowed lead counsel Ira Merkin, an experienced civil rights lawyer, $125 an hour for out of court work and $150 an hour for in court work. These determinations, none of which have been successfully challenged on appeal, support Mr. Squire's award of $145 an

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[22] *See* Memorandum Opinion in *Armour v State of Ohio*, Case No. C88-1104Y, filed September 23, 1992.

hour, given the nature of the controversy and Mr. Squire's experience.

Based on the experience of Kendrick-Hands and Edwards, their performance in court, the issues at hand, the novelty of the case and past awards for attorney fees the court is of the view that an appropriate rate for out of court work is $100 an hour and for in court work a rate of $125 an hour.[23]

F. Costs.

Kendrick-Hall requests an award of costs and expenses through September 29, 1992 in the sum of $5,509.37. It is well documented and unopposed, and therefore approved in its entirety.

Edwards also seeks an award of costs and expenses in the sum of $4,518.18. It is also documented and unopposed and therefore approved in its entirety.

G. Conclusion

Based upon the Court's determination as to hours and rates, the calculations leading to an allowance of attorney fees follow:

1. Karen Kendrick-Hands.

   (a) Pre-complaint –
   229.2 hr. x 50% x $100 = $11,460.00

   (b) Post-complaint –
   321.8 hr. x 75% x $100 = 23,125.00

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[23] As Edwards seeks only $110 an hour, his award will be predicated on an award of $110 an hour for in court work.

(c) Trial (not in courtroom)
- 60.5 hr. - 10 hr. x $100 = $ 5,050.00

(d) Trial time –
35 hrs. x $125 = $ 4,375.00

(e) Atty. Fee Computation
53.8 hr. x 50% x $100 = $ 2,690.00

Total $46,700.00

2. Steve Edwards.

(a) Post-complaint –
214.15 hr x 75% x $100 = 16,160.00

(b) Trial (not in courtroom)
23.7 hr. x $100 = $ 2,370.00

(c) Trial time –
35 hrs. x $110 = $ 3,850.00

(d) Attorney fee
11.7 hr. x $100 = $ 1,170.00

Total $23,550.00

The defendant has requested an evidentiary hearing on the issue of the number of hours claimed.[24] The court is reluctant to devote additional time to resolution of the attorney fee dispute. However, the court will conduct an evidentiary hearing if requested by either party on the sole issue of the number of hours to be allocated to counsel, if either party, after having the opportunity to review the court's opinion so moves by written motion filed by January 9, 1993. The court will withhold filing the judgment entry until after January 9, 1993.

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[24] The defendant has suggested that the court withhold a ruling on the issue of attorney fees until after the planned appeal is resolved. The court is of the view that all parties are entitled to a decision now on the issue of attorney fees to the extent the appeal will be broadened for the purpose of including the court's decision of fees and so that suggestion will not be followed.

## VI. THE APPLICATION OF DISMISSED DEFENDANTS FOR AN AWARD OF ATTORNEY FEES.

The application is denied. The defendants seeking an award of fees are the members of the Village Council who were sued in both their official and individual capacity. The court dismissed them from the lawsuit. In view of the granting of injunctive relief, the court arguably erred in dismissing the fee requesting defendants in their official capacity. In any event, the court finds in the context of *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984), *cert. denied* 470 U.S. 1051 (1985), that an award of attorney fees to the dismissed defendants would be inappropriate and their motion is denied.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| Mark E. Wayne, et al., Plaintiffs, vs. The Village of Sebring, Defendant. | ) | CASE NO. 4:91 CV 2016<br>JUDGMENT ENTRY<br>(Filed Jan. 12, 1993) |

For the reasons set forth in the Memorandum Opinion filed on December 29, 1992 and in reliance upon the jury verdict rendered in this case, IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. The Village of Sebring, its successors and assigns are hereby permanently enjoined from discontinuing water service to the plaintiffs Mark Wayne, Carla Wayne, Roland Kendrick, Brent Smith, Brenda Smith, Robert Rouse, Jr., Sharon Rouse, Donald Stillion, Beverly Stillion, William Tuel, Marjorie Tuel, Claude Bailey, Margaret Bailey, Larry Hartley, Kathleen Hartley, Judy Costello, Nancy Stuchell and Jeffrey Stuchell, their heirs, successors and assigns as to property owned by them and presently receiving water services from the Village of Sebring providing the plaintiffs, their successors and assigns comply with all lawful rules and regulations of the Village of Sebring as they relate to the providing of water services.

2. Judgment is awarded the plaintiff Roland Kendrick against the Village of Sebring in the sum of

$5,000.00 with interest according to law beginning with the date of this judgment.

3. Judgment is awarded the plaintiffs Mark and Carla Wayne against the Village of Sebring in the sum of $10,000.00 with interest according to law beginning with the date of this judgment.

4. Judgment is awarded the plaintiffs Bret and Brenda Smith against the Village of Sebring in the sum of $15,000.00 with interest according to law beginning with the date of this judgment.

5. Judgment is awarded the plaintiffs Jeffrey and Nancy Stuchell against the Village of Sebring in the sum of $13,600.00 with interest according to law beginning with the date of this judgment.

6. Judgment is awarded the plaintiff Judy Costello against the Village of Sebring in the sum of $12,000.00 with interest according to law beginning with the date of this judgment.

7. Karen Kendrick-Hands is awarded judgment against the Village of Sebring in the sum of $52,209.37 for attorney fees and expenses.

8. Steve Edwards is awarded judgment against the Village of Sebring in the sum of $28,068.19 for attorney fees and expenses.

9. Alfred Schrader is awarded judgment against the Village of Sebring in the sum of $1520.00 for attorney fees and expenses.

10. The application of the defendants J. Michael Pinkerton, James R. Conny, John W. Smith, Douglas L.

Eaton, James V. Daniels, Alan C. Flowers, and Joseph Igro, for an award of attorney fees and expenses is denied.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| Mark Wayne, et. al., Plaintiff, vs. The Village of Sebring, Defendant. | ) | CASE NO. 4:91 CV 2016<br>ORDER<br>(Filed Mar. 10, 1993) |

This litigation arose as a result of the policy of the defendant Village of Sebring eliminating water service to extra-territorial customers such as the plaintiffs unless they agreed to sign annexation papers. After extensive motion practice, the case was tried to a jury in September of 1992. The court directed a verdict on liability on behalf of the plaintiffs and the jury returned verdicts awarding compensatory damages. The court subsequently published a 42 page opinion on December 29, 1992 (Docket #146) in support of its decision to direct a verdict on liability and in explanation of its award of attorney fees. The court delayed publishing the final judgment entry until January 12, 1993, while waiting for either party to request an evidentiary hearing on the issue of attorney fees.

The publication of the January 12, 1993 predictably was the catalyst for another flurry of motions and briefs in this highly emotional litigation.

Sebring moved the court to amend or alter the judgment, (Docket #152), moved the court for judgment as a

matter of law, (Docket #153) and alternatively moved for a new trial, (Docket #154).

Sebring also moved for a stay of execution of the judgment in its capacity as a municipality. (Docket #159).

The plaintiffs moved for relief from the judgment (Docket #162) asserting that the court should have commenced the running of interest on the compensatory judgments on the day the jury returned its verdicts on September 29, 1992 rather than on the day the verdict was reduced to judgment, i.e. January 12, 1993.

The court, over the objections of the defendant, decided to resolve the issue of attorney fees now, rather than to wait for the appellate process to be completed on the judgment for the plaintiffs awarding compensatory and equitable relief so that the parties would know the size of the award for attorney fees for the purpose of possible settlement discussions and also to avoid a second appeal on that issue. The amount of interest on the compensatory judgments is *de minimus* and the court denies the motion of the plaintiffs to alter the judgment. (Docket #162)

The court has examined the defendant's motions to alter the judgment (Docket #152), for judgment as a matter of law (Docket #153) and the motion for a new trial (Docket #154) and finds that each is without merit and they are overruled.

The motion of the defendant for a stay of the execution of the judgment (Docket #159) is granted as it relates to the compensatory damages and attorney fees and

denied as it relates to the equitable relief set forth in the judgment entry.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

*Ordinance No.* 1477-90 *Passed* November 26, *1990*

COMMITTEE REVIEW:

INTRODUCED BY: *COUNCILMAN SMITH*

AN ORDINANCE PROHIBITING THE EXTENSION OF CITY OWNED WATER AND SEWER UTILITIES OUTSIDE THE MUNICIPAL CORPORATION LIMITS; REQUIREMENTS FOR CONTINUATION OF SERVICE; ANNEXATION AS A CONDITION, IF LOCATED IN MAHONING COUNTY, OHIO.

WHEREAS, the Council of the City of Sebring is solely vested with the power to extend municipally owned water and sewer utilities outside the municipal corporation limits; and

WHEREAS, the Council of the City of Sebring has discretionary authority to extend municipally owned water and sewer utilities outside the municipal corporation limits; and

WHEREAS, the Council of the City of Sebring recognizes its primary duty is to provide water and sewer utilities to residents of the City of Sebring; and

WHEREAS, the Council of the City of Sebring recognizes it has certain contractual obligations with the Village of Beloit and its residents; and

WHEREAS, the Council of the City of Sebring recognizes that there are users of the water and sewer utilities outside the municipal corporation limits who are not residents of the City of Sebring; and

WHEREAS, the Council of the City of Sebring, from time to time, has been requested by non-residents of the

City of Sebring to extend water and sewer utilities into the unincorporated areas of Mahoning County; [sic] Ohio; and

WHEREAS, the Council of the City of Sebring must assure the availability of its water and sewer utilities to its now existing residents and provide for the orderly growth and development of such utilities for its future residents; and

WHEREAS, there are written agreements with non-residents of the City agreeing to annexation as a requirement for continued use of water and/or sewer;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SEBRING, MAHONING COUNTY, OHIO:

*SECTION 1:* That no municipally owned and operated water and sewer utilities shall be henceforth extended into the unincorporated area of the county, unless it is first annexed to the City in accordance with law.

*SECTION 2:* That, except as otherwise provided herein, no water or sewer utilities shall be made available to any property, person, firm, business, municipal corporation or other entity outside the corporate limits of the City of Sebring.

*SECTION 3:* Those properties, persons, firms, businesses, corporations, municipal corporations or other entities outside the corporate limits of the City of Sebring which are currently receiving water and/or sewer utility services may continue to receive such services for a reasonable time, not to exceed One Hundred Eighty (180) days from the effective date of this Ordinance. Continued service of water and/or sewer utilities outside the municipal corporation limits

shall not be granted to any property, person, firm, business, corporation, or other entity unless there is a formal written contract with the non-resident user specifying the terms and conditions for the charge and the continued use of said City utilities; and the non-resident property owner's petition the Mahoning County Commissioners to be annexed into the City of Sebring in accordance with law. In no event, shall any utility be enlarged or extended to any non-resident user that is not currently being served by City utilities.

*SECTION 4:* The Village of Beloit shall continue to receive water service in accordance with the written agreement dated June 22, 1981, setting forth the terms, conditions, and covenants established by Ordinance between the two municipal governments. However, nothing contained in this Section shall be construed or implied that the Village of Beloit may extend or enlarge its municipal corporation limits either by voluntary or involuntary annexations, so as to extend water service owned by the City of Sebring to any area in the county that is not currently serviced with water on the effective date of this Ordinance.

*SECTION 5:* Nothing contained in this Ordinance shall prohibit the extension or continued use of water and/or sewer utilities used by any property, person, firm, business, corporation, municipal corporation, or other entity during the ordinary and necessary procedural process of annexation or merger of one municipal corporation into the City of Sebring.

*SECTION 6:* That the unincorporated residents of the Maple Ridge Water Association, Smith

Township, Mahoning County, Ohio, shall continue to receive water and/or sewer utilities so long as it exercises good faith in commencing an annexation petition with the Mahoning County Commissioners in accordance with the written contract, dated April 11, 1952, and amended May 5, 1960. Good faith shall mean the formation of an annexation committee, the appointment of an agent and the signatures of all water and/or sewer users and/or owners of the property served in accordance with law within One Hundred Eight (180) days after the effective date of this Ordinance. Failure to exercise good faith shall constitute a breach of said Water Association Contract and the City shall exercise its authority to terminate municipal utilities.

*SECTION 7:* That any property outside the corporation limits of the City of Sebring or the Village of Beloit that is currently being serviced with water and/or sewer and cannot be legally annexed into the City of Sebring because of a statutory prohibition shall be required as a continuation of said utilities, to enter into a written agreement with the City to specify the terms, conditions and covenants of service. Failure to enter into the agreement shall terminate the services.

*SECTION 8:* That the City Manager, City Engineer and City Solicitor are hereby authorized and instructed to prepare any and all maps, drawings, contracts, petitions, surveys, and other legal documents in order to aide or assist non-resident users or property owners that elect to be annexed as a condition of continued City utility usage.

*SECTION 9:* The City Manager shall give written notice to non-resident users and property owners to the last known address on file with the utility department that their utilities will be terminated within One Hundred Eighty (180) days after passage of this Ordinance unless they comply with the above Sections of this Ordinance. Written notice may be by post card or in letter form by regular United States mail.

*SECTION 10:* That it is found and determined that all formal actions of this Council relating to the passage of this Ordinance were adopted in open meeting of this Council; and that all deliberations of this Council and of any of its Committees which resulted in such formal actions were made in compliance with all legal requirements, including those of Section 121.22 of the Ohio Revised Code, all pursuant to Section 3.11 of the Charter of the City of Sebring.

PASSED this 26th day of November, 1990.

/s/ J. Michael Pinkerton
J. MICHAEL PINKERTON
Mayor – President of Council

ATTEST:

/s/ Judy Snyder
JUDY SNYDER
Clerk of Council

APPROVED AS TO LEGAL FORM:

/s/ Kenneth J. Cardinal
KENNETH J. CARDINAL
City Solicitor

*Ordinance No.* 1481-90 *Passed* December 27, *1990*

COMMITTEE REVIEW:

INTRODUCED BY: *COUNCILMAN SMITH – FLOWERS*

AN ORDINANCE AUTHORIZING THE CITY MANAGER TO ENTER INTO PUBLIC UTILITY SERVICE AGREEMENTS WITH OWNERS OF PREMISES OUTSIDE THE CORPORATION LIMITS CURRENTLY BEING SERVICED WITH PUBLIC UTILITIES; AND DECLARING AN EMERGENCY

WHEREAS, the Council of the City of Sebring adopted Ordinance No. 1477-90 on the 26th. [sic] day of November, 1990, setting forth requirements for continuation of public utility services to premises outside the corporation limits; and

WHEREAS, one the requirements was for the legal owner(s) of the premises to execute a written contract with the City of Sebring as a condition to receive said public utility;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SEBRING, MAHONING COUNTY, OHIO:

*SECTION 1:* That the City Manager shall and is hereby authorized and instructed to enter into an agreement with each and every owner outside the municipal corporation that is currently being served with a municipally owned public utility.

*SECTION 2:* That the Council of the City of Sebring hereby adopts and approves the "Agreement" attached hereto and marked as "Exhibit A" as if fully rewritten herein.

*SECTION 3:* That the City Manager shall not execute said Agreement unless and until he has received from the following documents and information by the legal fee simple owner(s) of the premises served by said public utilities: (A) copy of deed on file with the Mahoning County Recorder; (B) Permanent Parcel Number(s) of premises to be served and annexed; (C) Legal names and addresses of legal fee owners of the premises; (D) Signatures on the Agreement of the legal entities, including individuals, all partners, if a partnership, president and secretary, if a corporation, and all individuals, if owned by more than one person; (E) A certified or attested copy of a corporate resolution, if owned by a corporation; and (F) Signatures(s) on the Annexation Petition, if legally probable to be annexed and said premises being exclusively in Mahoning County.

*SECTION 4:* Each and every Agreement shall be specifically made referenced to this Ordinance and any other Resolution or Ordinance hereafter adopted, altered, amended or changed and shall be incorporated by reference thereinto.

*SECTION 5:* That this Ordinance is hereby declared to be an EMERGENCY MEASURE, necessary for the immediate preservation of the public peace, health, safety and welfare; and for the further reason that it is necessary to have available Agreements with owner(s) of premises outside the corporation limits so that said owner(s) can continue to have continued service of the municipal services after December 26, 1990, who execute said Agreement and an Annexation Petition. Wherefore, this Ordinance

shall become effective immediately upon passage in accordance with the provisions of Section 4.08 of the charter of the City of Sebring.

*SECTION 6:* That it is found and determined that all formal actions of this Council relating to the passage of this Ordinance were adopted in open meeting of this Council; and that all deliberations of this Council and of any of its Committees which resulted in such formal action were made in compliance with all legal requirements, including those of Section 121.22 of the Ohio Revised Code, all pursuant to Section 3.11 of the Charter of the City of Sebring.

PASSED this 27th day of December, 1990.

/s/ J. Michael Pinkerton
J. MICHAEL PINKERTON
Mayor – President of Council

ATTEST:

/s/ Judy M. Snyder
JUDY M. SNYDER
Clerk

APPROVED AS TO LEGAL FOR [sic]:

/s/ Kenneth J. Cardinal
KENNETH J. CARDINAL
City Solicitor

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## AGREEMENT

## PUBLIC UTILITY SERVICES OUTSIDE THE MUNICIPAL CORPORATION LIMITS

**THIS PUBLIC UTILITY AGREEMENT** made and entered into this ___ day of ___, 19___, by and between the municipality of Sebring, an Ohio chartered municipal corporation hereinafter referred to as "City" and ___ and ___, hereinafter referred to as "Customer", jointly and severally.

**WHEREAS,** on November 26, 1990, the City Council passed Ordinance No. 1477-90, setting forth the requirements of the Customer's continued use and service of the City's public utilities outside the municipal corporation limits; and

**WHEREAS,** the Customer, being a non-resident landowner outside the municipal corporation limits desires and voluntarily elects to continue to use and receive the City's public utilities; and

**WHEREAS,** the City desires to continue to provide public utilities to the Customer's premises;

**NOW, THEREFORE,** it is mutually agreed by and between the parties hereto as follows:

### ARTICLE I. CONSIDERATION

In consideration of the Customer continuing to receive public utilities and inducing the City to enter into the agreement to continue to provide City utilities to the premises, the City and Customer covenant, warrant and agree to be bound to the following terms and conditions:

A. Customer shall simultaneous and contemporaneous to the execution of this agreement sign a petition to be annexed into the City limits. Said annexation petition is specifically made reference hereto and incorporated herein as if fully rewritten, as now drafted or hereafter amended.

B. City shall continue to provide public utilities to the Customer's premises during the annexation process.

C. Customer shall if called upon by the City, sign one or more additional annexation petition as part of the consideration of continued public utilities.

D. Customer shall not do any act or deed inconsistent with the annexation process of Customer's premises that could result in the annexation petition being held invalid, illegal or rejected by the Mahoning County Commissioners or a court of competent jurisdiction.

**ARTICLE II. BINDING EFFECT**

This agreement shall be only binding upon the City and the Customer set forth above. In the event the Customer should sell, transfer, convey, gift or otherwise dispose, devise or enter into a 99 year lease prior to being annexed into the City limits, then in this event, the subsequent Customer-Owner must execute an agreement containing the terms and conditions set forth herein. In the event that the Customer is a husband and wife, this provision shall not apply so long as only one of them is the sole and only legal owner of the premises to be served by the public utility.

## ARTICLE III. APPLICABILITY OF UTILITIES

This agreement shall only bind the City to continue to provide to the Customer water and/or sewer service as now appears on the records of the City's utilities department. Nothing contained herein shall authorize or grant the Customer any additional public utility service not in current use. Customer shall continue to abide by the rules, regulations and charges and usage of the public utility department or City Ordinance as are now in effect, hereinafter altered, amended or changed.

## ARTICLE IV. TERMINATION

This agreement shall terminate without further notice by either party upon the happening of any one of the following events: 1) Annexation into the City of Sebring; 2) Breach of any covenant, warranty, term or condition by Customer; 3) Annexation into the Village of Beloit; or 4) Ordinance or Resolution by City Council terminating utility service(s) upon ninety (90) days notice.

## ARTICLE V. OWNERSHIP WARRANTY

Customer hereby warrants and represents that he, she or it is the fee simple owner(s) of the premises outside the corporation limit of the City of Sebring that is being serviced with the public utility. Further, the Customer's permanent parcel number(s) assigned to it by the Mahoning County Auditors Office is as follows: _____

_____

Address of Premises Serviced: _____

_____

_____

## ARTICLE VI. IMPOSSIBILITY OF PERFORMANCE

In the event that the Customer cannot sign an annexation petition as set forth in Article I because of a legal improbability of being annexed into the City of Sebring limits, then in this event, the Customer shall continue to receive public utilities in accordance with this Agreement until the premises does become subject to being annexed in accordance with law. Thereafter, the Customer shall comply with the conditions, terms, covenants and warranties as set forth in this Agreement as a condition of continued utility service.

## ARTICLE VII. INCORPORATION WITH LAW

This agreement shall incorporate by reference each and every ordinance, resolution, rule and regulation now enacted or hereinafter adopted or enacted under the authority of the City Council and/or City Manager.

CITY OF SEBRING

BY: _____
CHARLES H. TIECHE
City Manager

CUSTOMER

_____

_____

_____

BY: _____
PRESIDENT
(IF CORPORATION)

_____

*Resolution No.* 805-91 *Passed* April 22, *1991*

RESOLUTION

COMMITTEE REVIEW:
INTRODUCED BY:
DATE OF FIRST READING:
REFERRED TO PLANNING COMMISSION:
ACCEPTANCE/REJECTION OF COMMISSION:
NOTICE OF PUBLIC HEARING:
SECOND READING:
THIRD READING:
PASSED/DEFEATED:

A RESOLUTION REPEALING LOAN RESOLUTION NO 575-81 PROVIDING FOR THE INCURRANCE OF INDEBTEDNESS FOR THE PURPOSE OF PROVIDING A PORTION OF THE COST OF ACQUIRING, CONSTRUCTING, ENLARGING, IMPROVING AND/OR EXTENDING ITS WATERWORKS SYSTEM FACILITY TO SERVE AN AREA LAWFULLY WITHIN ITS JURISDICTION TO SERVE; AND DECLARING AN EMERGENCY.

WHEREAS, on the 14th. day of September, 1981, Council of the Municipality of Sebring passed Loan Resolution No. 575-81; and

WHEREAS, Loan Resolution No. 575-81 was passed to accommodate the Farmers Home Administration, United States Department of Agriculture acting under the provisions of the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq*); and

WHEREAS, Loan Resolution No. 575-81 provided for bond financing in the amount of THREE MILLION FIVE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS

($3,575,000.00) from said Farmers Home administration; and

WHEREAS, Loan Resolution No. 575-81 was to be binding upon the municipality of Sebring only so long as the bonds were held or insured by the Farmers Home Administration; and

WHEREAS, since 1987, Farmers Home Administration has no longer held or insured bonds on the waterworks project as set forth in Loan Resolution 575-81; and

WHEREAS, since 1987 the waterworks system has been financed with General Electric Capital Corporation;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE MUNICIPALITY OF SEBRING, MAHONING COUNTY, OHIO:

*SECTION 1:* Loan Resolution 575-81 is hereby repealed without substitution or reservation.

*SECTION 2:* That this Resolution is hereby determined to be an EMERGENCY MEASURE necessary for the immediate preservation of the public health, safety, and welfare of the citizens of the Municipality of Sebring, Ohio, and for the further reason that the Loan Resolution No. 575-81 is of no legal significance and is one only of historical purposes.

WHEREFORE, this Resolution shall become effective as of 12:01 A.M., April 23, 1991.

PASSED this 22 day of April, 1991.

/s/ J. Michael Pinkerton
J. MICHAEL PINKERTON
Mayor – President of Council

ATTEST:

/s/ Judy M. Snyder
JUDY M. SNYDER
Clerk of Council

APPROVED AS TO LEGAL FORM:

/s/ Kenneth J. Cardinal
KENNETH J. CARDINAL
Solicitor

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

| | | |
|---|---|---|
| ROGER KURG, ET AL., PLAINTIFFS-APPELLANTS, Vs. CITY OF SEBRING, DEFENDANT-APPELLEE. | ) ) ) ) ) ) ) | CASE NO. 92 C.A. 49 OPINION |

| | |
|---|---|
| CHARACTER OF PROCEEDINGS: | Civil Appeal from Common Please Court Case No. 90CV-2686 |
| JUDGMENT: | Affirmed |
| APPEARANCES: | |
| For Plaintiffs-Appellants: | Atty. Steve J. Edwards<br>4030 Broadway<br>Grove City, Ohio 43123 |
| For Defendant-Appellee: | Atty. Alan E. Johnson<br>Atty. Smith R. Brittingham IV<br>Atty. Leo R. Ward<br>The Dallas Building<br>2217 East Ninth Street<br>Cleveland, Ohio 44115<br><br>Atty. Kenneth J. Cardinal<br>Solicitor, Village of Sebring<br>135 East Ohio Avenue<br>Sebring, Ohio 44672 |

JUDGES:

Hon. Edward A. Cox
Hon. Joseph E. O'Neill
Hon. Gene Donofrio

Dated: December 30, 1993

DONOFRIO, J.

On November 20, 1990, plaintiffs-appellants, Roger Krug and other similarly situated individuals residing in the Village of Beloit, just east of the City of Sebring, filed a complaint in the Mahoning County Common Pleas Court seeking an order of specific performance directing defendant-appellee, City of Sebring, to provide them water through its waterworks by allowing the extension of waterlines into Beloit to their properties. On March 27, 1992 the trial court granted summary judgment in favor of the City of Sebring and this appeal follows.

In 1979, the then Village of Sebring applied for a $3,750,000 loan from the Farmers Home Administration (FmHA) in order to expand its waterworks. In 1981, Sebring adopted a capitalized Loan Resolution in order to be eligible for such loan and did so in the form of Ordinance No. 575-81. The pertinent sections of this ordinance states as follows:

> "14. [The association hereby resolves] To provide adequate service to all persons within the service area who can feasibly and legally be served and to obtain FmHA's concurrence prior to refusing new or adequate services to such persons. Upon failure to provide services which are feasible and legal, such person shall have a direct right of action against the association or public body.

" * * *

"The provisions hereof and the provisions of all instruments incident to the making or the insuring of the loan, unless otherwise specifically provided by the terms of such instruments, *shall be binding upon the association as long as the bonds are held or insured by the Government.* The provisions of sections 6 through 13 hereof may be provided for in more specific detail in the bond resolution or ordinance, to the extent that the provisions contained in such bond resolution or ordinance should be found to be inconsistent with the provisions hereof, these provisions shall be construed as controlling as between the association and the Government." (Emphasis added).

Sebring was successful in its application and subsequently received the loan.

On November 26, 1990, the City of Sebring enacted Ordinance No. 1477-90 prohibiting the extension of its utility services outside the corporate limits of Sebring. A referendum petition was filed on December 21, 1990 in opposition to this ordinance. Subsequent to such filing, Sebring enacted an emergency ordinance which, in effect, prohibits the extension of utility services outside corporate limits (Ordinance No. 1481-90). Although the original ordinance was defeated by referendum on November 5, 1991, emergency ordinances are not subject to referendums.

In their sole assignment of error, appellants contend the trial court erred in granting summary judgment in favor of appellee. The basis of the assignment is that the Loan Resolution previously passed by the Village of

Sebring is still effective and binding upon Sebring thereby requiring them to extend and provide water service to appellants.

The trial court found that the Loan Resolution passed by appellee was analogous to a loan application and created no rights in third parties. The central issue on appeal becomes whether the Loan Resolution creates a right by which appellants can force the City of Sebring to provide water service to them. Although appellants contend Title 7, U.S. Code, Section 1921, *et seq.* also requires the extension of water service to them, we find, pursuant to those sections, Sebring is not required to provide water service to appellants beyond the time the bonds are held or insured by the federal government.

Ohio law is clear that a municipality is not obligated to provide utility services to anyone located outside the corporate limits of the municipality. *Fairway Manor, Inc. v. Bd. of Commrs. of Summit Cty.* (1988), 36 Ohio St.3d 85. Such a duty may, however, originate by way of contractual obligations. In the present case it is not argued that a contract exists.

Appellants contend Sebring is bound by the Loan Resolution and would not have received the loan without agreeing to extend water services to extra-territorial residents. The Loan Resolution, by its very terms, is binding only as long as the bonds are held or insured by the federal government. The federal government approved the loan application based on the Loan Resolution as it was written. The record clearly shows, and appellants admit, that the bonds were sold to a private agency in 1987. At that time, the bonds were no longer held by or

insured by the federal government. As such, the City of Sebring has no duty to supply water to appellants.

For the foregoing reasons, appellants' sole assignment of error is without merit and the decision of the trial court is affirmed in all respects.

Cox, P. J., concurs
O'Neill, J., concurs

APPROVED:

/s/ Gene Donofrio
Gene Donofrio
Judge

Supreme Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

No. 94-1601

In The

# Supreme Court of the United States

October Term, 1994

THE VILLAGE OF SEBRING,

*Petitioner,*

vs.

MARK E. WAYNE; CARLA L. WAYNE; ROLAND L. KENDRICK; BRET E. SMITH; BRENDA S. SMITH; ROBERT J. ROUSE, JR.; SHARON ROUSE; DONALD G. STILLION; BEVERLY J. STILLION; WILLIAM H. TUEL; MARJORIE R. TUEL; CLAUDE J. BAILEY; MARGARET J. BAILEY; LARRY L. HARTLEY; KATHLEEN J. HARTLEY; JUDY K. COSTELLO; NANCY STUCHELL; AND JEFFREY STUCHELL,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

REASONS TO DENY THE WRIT ..... 7

I. IN A CLAIM UNDER 42 U.S.C. SECTION 1983, A MUNICIPAL CORPORATION MAY NOT JUSTIFY ITS REFUSAL TO CONDUCT DISCOVERY BY RELYING ON THE STAY OF DISCOVERY THAT ACCOMPANIES QUALIFIED IMMUNITY ..... 7

A. The Trial Court's Refusal to Stay Discovery Between Petitioner and Respondent did not Violate any of the Policies that Underlie the Stay of Discovery that Accompanies Qualified Immunity ..... 8

B. Petitioner Waived this Error by Failing to Raise it Before the Trial Court or the Court of Appeals ..... 10

C. Any Discovery Abuse Would Only Affect Damages, not Liability ..... 10

D. The Lack of Reported Cases Demonstrates that this Question is Unimportant and not Ripe for Review ..... 12

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE LEGAL ISSUES PRESENTED IN THIS LITIGATION ..... 12

A. The Intricacies of the FmHA Water Facilities Loan Program are not of Enough Importance to Merit a Grant of Certiorari ..... 13

B. The Facts are Unique and Unlikely to Recur ..... 14

TABLE OF CONTENTS – Continued

Page

III. THE PETITION CONTAINS NUMEROUS FACTUAL MISSTATEMENTS WHICH, IF RELIED ON, COULD LEAD TO AN IMPROVIDENT GRANT OF CERTIORARI ..... 15

IV. BORROWER'S OBLIGATIONS TO NONRESIDENTIAL USERS SURVIVE THE SALE OF THE FMHA LOAN PORTFOLIO MANDATED BY THE OMNIBUS BUDGET RECONCILIATION ACT OF 1986 ..... 18

V. REVERSAL OF THE LOWER COURTS' HOLDING THAT THE OBLIGATIONS OF THE LOAN RESOLUTION SURVIVE FMHA'S FORCED SALE OF THE LOAN PORTFOLIO WOULD TRIGGER OPERATION OF THE MEMORANDUM OF UNDERSTANDING – A POTENTIAL TWO BILLION DOLLAR LIABILITY FOR TAXPAYERS ..... 21

VI. THE LOWER COURTS CORRECTLY FOUND A CAUSE OF ACTION EXISTS UNDER FMHA'S COMMUNITY FACILITIES LOAN PROGRAM AND THE CIVIL RIGHTS ACT FOR RESPONDENTS WHO ARE ENTITLED TO CONTINUING WATER SERVICE..... 22

VII. THE LOWER COURT GRANTED JUDGMENT TO RESPONDENTS BASED UPON A VIOLATION OF FEDERAL LAW ..... 28

VIII. THE COURT OF APPEALS CORRECTLY REMANDED TO THE DISTRICT COURT THE ISSUE OF EXTENDING THE INJUNCTION TO ROBERT AND SHARON ROUSE REGARDING SEWER SERVICE ..... 30

# TABLE OF AUTHORITIES

Page

CASES

*Ashbrook v. Block*, 917 F.2d 918 (6th Cir. 1990) ....27, 28

*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) ..... 28

*California v. Taylor*, 353 U.S. 553 (1956) ..... 10

*City of Madison, Miss. v. Bear Creek Water Ass'n*, 816 F.2d 1057 (5th Cir. 1987)..... 13, 24, 25

*CSL Utils. Inc. v. Jennings Water, Inc.*, 16 F.3d 130 (7th Cir. 1993).....13, 15

*Glenpool Util. Services v. Water Dist. No. 2*, 861 F.2d 1211 (10th Cir. 1988)..... 13, 14, 23, 24

*Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) ..... 27

*Graham v. Goodcell*, 282 U.S. 409 (1931) ..... 28

*Grandview Heights v. Columbus*, 174 Ohio St. 473, 190 N.E.2d 453 (1963) ..... 29

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982) .....8, 9

*Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311 (7th Cir. 1989)..... 13, 22, 24, 26

*Jennings Water, Inc. v. City of North Vernon, Ind.*, 682 F. Supp. 421 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (7th Cir. 1989).....13, 25

*Krug v. Sebring*, Case No. 92 C.A. 49 (Mahoning Cty. Ct. App. Dec. 30, 1993) ..... 3

*Landgraf v. USI Film Products*, ___ U.S. ___, 114 S.Ct. 1483, 128 L. Ed. 2d 256 (1994)..... 28

TABLE OF AUTHORITIES – Continued

Page

*Moore Bayou Water Ass'n v. Town of Jonestown*, 628 F. Supp. 1367 (N.D. Miss. 1986).....13, 24

*North Shelby Water Co. v. Shelbyville Mun. Water*, 803 F. Supp. 15 (E.D. Ky. 1992).....13

*Pinehurst Enters. v. Town of Southern Pines*, 690 F. Supp. 444 (M.D.N.C. 1988).....13, 24

*Ransom v. Marrazzo*, 848 F.2d 398 (3d Cir. 1988).....29

*Rural Dist. No. 3 v. Owasso Utils. Auth.*, 530 F. Supp. 818 (N.D. Okla 1979).....13, 24

*Smith v. Dearborn Fin. Servs.*, 982 976 (6th Cir. 1993).....28

*Suter v. Artist M*, ___ U.S. ___, 118 L. Ed. 2d 1 (1992).....27

*Wayne v. Sebring*, 36 F.3d 517 (6th Cir. 1994).....13

*Webster v. Sowders*, 846 F.2d 1032 (6th Cir. 1988).....10

*Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990).....27

*Wright v. Roanoke Redev. & Hous. Auth.*, 499 U.S. 418 (1986).....27

STATUTES

7 U.S.C. §1921, et seq.....3, 11, 27

7 U.S.C. §1926(a)(1).....22

7 U.S.C. §1926(a)(20).....28

7 U.S.C. §1926(b).....*passim*

7 U.S.C. §1926(a) and (b).....14

TABLE OF AUTHORITIES – Continued

Page

7 U.S.C.A. §1929a ..... 4

7 U.S.C. §1989 ..... 26

28 U.S.C. §1367(a) ..... 29

42 U.S.C. §1983 ..... 27, 29

Ohio Rev. Code §703.01 ..... 5

Ohio Rev. Code §731.29 ..... 5

Agricultural Credit Act of 1987, Pub.L. 100-233 §803, 100 Stat. 1714 ..... 4, 25

Omnibus Budget Reconciliation Act of 1986, Pub.L. 99-509, §1001 ..... 3, 4, 18, 25

REGULATIONS

7 C.F.R. §1942.17(b)(3) ..... 27

7 C.F.R. §1942.17(d)(1)(i) ..... 27

7 C.F.R. §1942.17(g)(2)(i)(B) ..... 27

7 C.F.R. §1942.17(h)(2) ..... 27

7 C.F.R. §1942.17(n) ..... 18

7 C.F.R. §1942.17(n)(2)(vii) ..... 26, 27, 29

7 C.F.R. §1942.19(10) ..... 27

OTHER AUTHORITIES

S. Rep. No. 566, 87th Cong. 1961 U.S. Code, Cong. & Admin. News 2243 ..... 23, 24

Respondents Mark E. Wayne, et al., oppose the Village of Sebring's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## STATEMENT OF THE CASE

Respondents adopt the facts as found by the Honorable David Dowd, N. D. Ohio and affirmed by the Sixth Circuit (rehearing and rehearing en banc denied). As the dispute evolved, the facts have become ever more complex due to a series of evasive maneuvers taken by Sebring in bad faith to damage the extraterritorial water customers. Petitioner's disjointed retelling contains several factual inaccuracies which will be corrected in the Argument below.

This litigation involves both a simple story and a complex story, the two of which intertwine. The dispute shaping the simple story arises from Sebring's attempt to compel extraterritorial customers of its water system to annex, as a condition of *continuing* water and sewer service, within federally funded service areas, in violation of federal law. Because the ground water in the area is poor or nonexistent and because of the ban on alternate water suppliers under 7 U.S.C. §1926(b), petitioner's actions will leave respondents without water. The respondents own parcels which have been connected to either the village water[1] or sewer system[2] or both[3] for as long as eighty years. Respondents sued to

---

[1] Mark and Carla Wayne, Bret and Brenda Smith, Jeffrey and Nancy Stuchell, Roland Kendrick, Claude and Margaret Bailey, Larry Hartley, Don and Beverly Stillion and William and Marjorie Tuel. Kathleen Hartley died during the litigation.

[2] Robert and Sharon Rouse

[3] Judy K. Costello

enforce their rights to continue existing services from petitioner.

Respondents Wayne, Kendrick, Tuel, and Bailey receive their water through pipes laid by the Maple Ridge Water Association [MRWA].[4] Taps were extended to non-resident users in the area under a 1952 agreement between MRWA and petitioner which did not require annexation.

Other parcels outside of the village limits, and not within the now defunct MRWA, have applied for and been granted water service, including those owned by respondents Costello, Smith, Stuchell, Stillion, and Hartley. Costello and the Rouses also receive sewer service.

Every extraterritorial water and sewer customer has applied for service, abides by Sebring's Farmers Home Administration [FmHA] approved regulations and pays quarterly bills with a nonresident surcharge.

Water is also provided to the extraterritorial residents of Beloit under a second water agreement, also affected by the FmHA loan. The Village of Beloit is an even smaller village than Sebring, located one mile east of Sebring's village limits. Beloit has a forty year contract with the Sebring for supply of water to its residents which is for the same term as Sebring's FmHA loan.[5]

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[4] Contrary to its claim at p. 13, petitioner first raised the issue of the condition of MRWA lines only after the commencement of this litigation. The condition of extraterritorial distribution lines was not discussed in the extensive and detailed preamble to Ordinance 1477-90. Pet. 114a-115a. The engineer's study was contracted for and performed only after litigation began.

[5] It is the extension of new water service east of Beloit which was at issue in the Ohio case cited by petitioner, *Krug v. Sebring*, Pet. 129a-133a.

By the late seventies, Sebring's water system needed major repairs. Because Sebring's water supply was inadequate, there was a moratorium on new taps. That is why respondent Rouse has only Sebring sewer service and not water too. On January 26, 1978, Sebring filed its application for a grant/loan combination from FmHA. As authorized by Congress, FmHA administers a community facilities loan and grant program designed to provide potable, i.e. safe drinking, water to rural residents. 7 U.S.C. 1921 et seq.

Because improvements were financed with a forty year loan at 5% from the FmHA in 1981, Sebring has federal contractual and legal obligations to maintain service where legal and feasible without conditioning its continuation upon annexation. Loan Resolution ¶14, Pet. pp. 6-8. Petitioner's contentions about the service area map and lack of a "meeting of the minds" are meritless and will be discussed below in Section III.

In the Omnibus Budget Reconciliation Act of 1986 [OBRA 1986], Pub. L. 99-509, §1001, Congress ordered the sale of FmHA loans, including petitioner's, to meet budget deficit reduction targets. All terms and conditions of the original loan agreements between the borrowers and FmHA remained unchanged except for the graduation provision which is not at issue here. General Electric Credit Corporation [GECC] became the master servicer of Sebring's loan when it was purchased by Private Trust 1987a [the Trust]. As both the Courts below correctly held, petitioner's obligations continue unchanged, notwithstanding the congressionally mandated sale of the FmHA loan to private investors in 1987.

Congress subsequently amended § 1001 of the 1986 OBRA to clarify that earlier prohibitions on the curtailment of service still applied notwithstanding the transfer. Agricultural Credit Act of 1987, Pub. L. 100-233 §803, 101 Stat 1714, recorded at 7 U.S.C.A. §1929a note. FmHA and the Trust also entered into a side agreement Memorandum of Understanding Regarding Enforceability [MOU], Resp. 11a-16a, which calls for FmHA to repurchase loans which become defective upon a lower court finding that the Loan Resolution is unenforceable because the loan is "no longer held or insured by the government."[6] Under this MOU the federal government's potential repurchase liability is over two billion dollars.

Sebring's response to the sale of its loan to the Private Trust was to make its payments and reports to GECC, the master servicer, rather than to FmHA. Its policy about extension and continuation of service did not change. Notwithstanding the 1987 transfer, Sebring kept all of its commitments under the Loan Resolution

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[6] The full text of the enforceability clause provides:
The provisions hereof and the provision of all instruments incident to the making or insuring of the loan, unless otherwise specifically provided by the terms of such instruments, shall be binding upon the association as long as the bonds are held or insured by the Government. The provisions of Section 8 through 13 hereof may be provided for in more specific detail in the bond resolution or ordinance; to the extent that the provisions contained in such bond resolution or ordinance should be found to be inconsistent with the provisions hereof, the provisions shall be controlling as between the association and the Government.

including continued service to existing customers, and extension of taps to extraterritorial customers like Mark Wayne, until 1990. In October 1990, days after receiving the United States census results which changed Sebring's status from a city back to village, because its population fell below 5,000, Ohio Rev. Code §703.01, petitioner enacted Ordinance 1477-90, Pet. 114a-118a, to implement the policy of annexation-for-water under which respondents and their neighbors were threatened with discontinuation and nontransferability of existing water service. Pet. 5a, 36 F.3d at 523. Petitioner did not seek FmHA's concurrence before enacting this ordinance, as it is required to do.

Ordinance 1477-90 was the subject of a voter-initiated referendum held November, 1991, at which time it was defeated. Although under Ohio law a referendum stays the operation of the questioned ordinance, Ohio Rev. Code §731.29, both reviewing courts have found that Sebring officials, nevertheless, implemented the illegal policy. Pet. 6a, 36 F.3d 523-24, 72a. At trial Sebring's city manager, Charles Teiche, and its mayor, Michael Pinkerton, admitted that on the advice of petitioner's counsel, Ken Cardinal, notwithstanding the referendum, they had begun to implement the policy underlying referended Ordinance 1477-90, to require annexation as a condition of *continuation* of service. This was a departure from the prior policy of Sebring, which had sometimes linked agreement to annex only with *extension* of new water and sewer service.[7]

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[7] Sebring persists in its unique interpretation that water or sewer service to a previously served parcel becomes "new" service when ownership is transferred. This novel

The uncertainty of service availability caused by petitioner's implementation of a policy under an ordinance that is a nullity, meant that respondents Mark and Carla Wayne could not qualify for FHA financing and Bret and Brenda Smith were forced to haul drinking water. Costello and Kendrick were unable to complete the sale of their homes, notwithstanding signed purchase agreements, because Sebring extended its new policy of no new water and sewer customers to purchasers and transferees of parcels with existing service. Jeff and Nancy Stuchell were forced to sell their mobile home at a loss, when they were denied reconnection after a fire. The threat of termination of water services upon the sale of an extraterritorial resident's property decreased the value of all homes affected by the ordinance, because they were virtually impossible to sell. The lower courts correctly summarized the specific injuries particular to each household. Pet. 6a-7a; 36 F.3d 524; 72a-74a.

Petitioner's elected and appointed officials pursued the policy, even after having been notified of the individual hardships this caused the respondents, and notwithstanding advice from Mahoning County officials as to the public health hazard created by terminating water. Petitioner ignored clear directives from both FmHA and the Trust, the current note holder, by its agent GECC that Sebring should honor Paragraph 14 of the Loan Resolution and that Sebring's conduct was a breach of the federal loan agreement.

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interpretation finds no support in the case law: The right to water and sewer service runs with the land. The determinative event is when the property is tapped in. All plaintiffs own property which has been tapped into the Sebring water system prior to the enactment of Ordinance 1477-90.

The complex story involves the United States government's potential liability, under this MOU, to repurchase defective loans in the amount of two billion dollars – a sum nonexistent in the current deficit-ridden federal budget. The respondents were the victims in the simple story. Every taxpayer in the United States will be victimized by the conduct of petitioner if certiorari is granted and the complex story is played out.

## REASONS TO DENY THE WRIT

### I. IN A CLAIM UNDER 42 U.S.C. SECTION 1983, A MUNICIPAL CORPORATION MAY NOT JUSTIFY ITS REFUSAL TO CONDUCT DISCOVERY BY RELYING ON THE STAY OF DISCOVERY THAT ACCOMPANIES QUALIFIED IMMUNITY

The Defendants herein were the Village of Sebring, the Mayor of Sebring, Michael Pinkerton, and each of the village council members. (Pet. ii). The mayor and the council members were sued both in their official and individual capacities. (*Id.* at ii). The same attorneys represented the Village of Sebring and all the individual defendants, in both capacities. The only exception to this was councilman James Daniels who was represented in his individual capacity by attorney William Shetler, who merely filed an appearance, and attended two conferences.

Petitioner first appeared in this case on October 11, 1991. Discovery was stayed on November 14, 1991, until February 29, 1992, to allow settlement negotiations. On March 5, 1992, the Trial Court set the case for trial and ordered that discovery be completed by June 1, 1992. Sebring engaged in no discovery and on April 27, 1992, the individual defendants filed for judgment on the

pleadings based on qualified immunity. On April 28, 1992, these same defendants moved to stay discovery. On May 6, 1992, the Trial Court granted the Motion to Stay Discovery, "In light of the pending motion, [qualified immunity] the Court hereby stays discovery *solely as it regards the Defendants named above [all defendants except Sebring]. Discovery on the remainder of the case will continue until June 1, 1992, as originally scheduled.* (emphasis added). Pet. 39a. Petitioner was on notice that it had a duty to proceed with discovery.

### A. The Trial Court's Refusal to Stay Discovery Between Petitioner and Respondent did not Violate any of the Policies that Underlie the Stay of Discovery that Accompanies Qualified Immunity.

Respondents sent out interrogatories and requests to produce. In contrast, petitioner conducted no discovery; however, it required none because respondents had provided discovery by attaching extensive affidavits to their motion for preliminary injunction that were signed by respondents seeking monetary damages and disclosed all relevant information.

Petitioner cites *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and several subsequent cases to support its argument that no discovery should proceed by any party on any issue until the question of qualified immunity is resolved. Pet. at 18. In all the cases cited by petitioner, the only defendant was a government official and therefore a favorable ruling on the issue of qualified immunity would end the case. However, herein, in addition to the individual Village officials, the Village itself was a defendant. This, along with the fact that the same attorneys

represented both the officials and petitioner, completely distinguishes this case from those cited by petitioner. Regardless of the outcome on qualified immunity, these same defense attorneys would have to conduct discovery on behalf of petitioner, since qualified immunity can only be raised on behalf of individual government officials and not by a municipal corporation. The Court of Appeals noted this distinction:

> The problem with this argument [stay of all discovery pending decision on qualified immunity] is that the Village itself did not move, and could not have moved, for dismissal on this basis [qualified immunity]; and therefore it should have proceeded with discovery during the assigned discovery period.

36 F.3d at 330.

When a defense of qualified immunity is raised, the policy of staying discovery protects government officials from the burden of discovery until the immunity issue is decided.

> [B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery . . . Until this threshold immunity question is resolved, discovery should not be allowed.

*Harlow v. Fitzgerald* 457 U.S. 800, 817 (1982).

The policy of protecting individual government officials, which underlies a stay of discovery, is not involved herein. The stay of discovery in *Harlow* was never intended to excuse petitioner discovering respondents' case. Sebring is not seeking to use *Harlow* as a shield against unwarranted discovery but is instead using it to excuse its own failure to conduct discovery.

### B. Petitioner Waived this Error by Failing to Raise it Before the Trial Court or the Court of Appeals.

Petitioner argues that discovery should have been stayed because Defendant Daniels would have faced the "dilemma" of incurring the expense of discovery or foregoing discovery while awaiting the Trial Court's decision on the defense of qualified immunity, thereby potentially prejudicing his defense. Pet. 20. Petitioner never raised Defendant Daniels' alleged dilemma at the trial court or at the Court of Appeals. In their brief before the Sixth Circuit, petitioner's entire argument on discovery was twenty-three (23) lines long and did not raise this issue. If this argument had been timely raised, respondents would have dismissed councilman Daniels in his individual capacity, thereby eliminating any alleged dilemma. Since petitioner did not raise this issue in the lower courts, it has failed to preserve the issue. *California v. Taylor*, 353 U.S. 553, 556 n.2 (1956).

### C. Any Discovery Abuse Would Only Affect Damages, not Liability.

Respondents sought declaratory and injunctive relief to enforce Sebring's obligation to continue water and sewer service so respondents could continue to enjoy these necessities of life. The defense of "qualified immunity is ordinarily available only from damages and not from injunctive relief." *Webster v. Sowders*, 846 F.2d 1032, 1039, n.5 (6th Cir. 1988). The stay of discovery that accompanies qualified immunity therefore only accompanies respondents' damage claims. Petitioner should have proceeded with discovery since respondents' claims for injunctive and declaratory relief against the government

officials would have remained regardless of the decision on qualified immunity.

The Trial Court granted judgment as a matter of law for respondents. The standard for that is:

> When reviewing a district court's decision to grant or deny a motion for judgment as a matter of law, we apply the same standard as that used by the district court: the court should neither weigh the evidence, evaluate the credibility of the witnesses, nor substitute its judgment for that of the jury; rather it must view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences. (Citations omitted). "Only when it is clear that reasonable people could come to but one conclusion from the evidence should a court grant a motion for directed verdict." (Citations omitted).

36 F.3d 525, Pet. at 10a.

Petitioner is not arguing that the judgment as a matter of law was error.[8] The Trial Court held, as a matter of law, that Resolution #575-81 passed by petitioner on September 14, 1981, to obtain the loan from FmHA was still in force despite the sale of the loan by FmHA. Pet. 85a-86a. This Loan Resolution contained a promise by Sebring that it would serve everyone in the service area if it were legal and feasible. Petitioner does not dispute that all of the respondents have or had water service so it is uncontroverted that service was both legal and feasible.

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[8] Petitioner only argues that respondents do not state a claim. If respondents had stated a claim under 7 U.S.C. §1921, et seq., as they did, then the directed verdict was proper.

36 F.3d 526, Pet. 11a. Therefore no discovery from respondents could have helped petitioner on the liability question.

### D. The Lack of Reported Cases Demonstrates that this Question is Unimportant and not Ripe for Review.

Few cases discuss the discovery issue raised by petitioner. Respondents sued a municipal corporation and its elected legislative officials, in both their official and individual capacities. All defendants are being defended by the same attorneys. This same situation is common in civil rights cases. If the error allegedly committed herein were as grievous and prejudicial as petitioner argues, there would be dozens of reported cases on this issue. Petitioner does not cite one reported case on the exact issue that it is raising. This lack of cases shows that the Federal Courts have not considered this an important issue. This is an issue that has never generated a reported Court of Appeals decision.

The lack of reported cases also shows that this question is not ripe for review. It would be premature for this Court to hear this issue without the benefit of lower court decisions.

## II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE LEGAL ISSUES PRESENTED IN THIS LITIGATION.

Uniformly, the circuits have correctly interpreted the dual purposes of the legislation which authorized the FmHA Community Facilities Loan Program: to preserve

the customer base undiminished to assure loan repayment, and to protect the rural water users' access to safe drinking water.

All the circuits, including the Sixth in the opinion below, have consistently concluded that Congress intended residential users such as respondents to be the ultimate program beneficiaries and that the customer base is sacred. *Wayne v. Sebring*, 36 F.3d 517 (6th Cir. 1994); *CSL Utils. Inc. v. Jennings Water, Inc.*, 16 F.3d 130, 134 (7th Cir.) cert. denied ___ U.S. ___, 115 S. Ct. 65 (1994), (distinguishing between permitting an existing wholesale customer to improve its water system and the forbidden substitution of a third party water-supplier to compete with FmHA-indebted Jennings.) *Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311 (7th Cir. 1989); *Glenpool Util. Services v. Water Dist. No. 2*, 861 F.2d 1211, 1213 (10th Cir. 1988); *City of Madison, Miss. v. Bear Creek Water Ass'n*, 816 F.2d 1057 (5th Cir. 1987); *North Shelby Water Co. v. Shelbyville Mun. Water*, 803 F. Supp. 15 (E.D. Ky. 1992); *Jennings Water, Inc. v. City of North Vernon, Ind.*, 682 F. Supp. 421, 425, (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (1989); *Pinehurst Enters. v. Town of Southern Pines*, 690 F. Supp. 444, 451 (M.D.N.C. 1988); *Moore Bayou Water Ass'n v. Town of Jonestown*, 628 F. Supp. 1367 (N.D. Miss. 1986). *Rural Dist. No. 3 v. Owasso Utils. Auth.*, 530 F. Supp. 818 (N.D. Okla 1979). Because there is no conflict among the circuits, there is no need for the Supreme Court to address this issue.

### A. The Intricacies of the FmHA Water Facilities Loan Program Are Not of Enough Importance to Merit a Grant of Certiorari.

The FmHA Community Facilities Program is an extremely insignificant federal benefits program, even

when measured against the entire budget for the whole Department of Agriculture. There are fewer than a dozen reported cases in the entire 34 year life of the water facilities loan program under the Consolidated Farm and Regional Development Act. 7 U.S.C. §1926(a) and (b). The FmHA loan and grant program is a modest federal benefits program – crucial to those receiving its services, but not affecting the millions who receive benefits from Medicaid, Medicare, AFDC or the Veterans Administration. The lower court decisions do not create additional benefits for respondents, nor increase the burdens of federal or state agencies. Denial of the petition for certiorari will simply leave in place petitioner's obligation to continue water service to paying customers – an obligation freely undertaken 15 years ago in order to receive a federal benefit. "[A]cceptance of [federal] funds entails acceptance of the conditions that accompany them." *See Glenpool Util. Services v. Water Dist. No. 2*, 861 F.2d 1211, 1215 (10th Cir. 1988). The petition for certiorari should be denied.

**B. The Facts are Unique and Unlikely to Recur.**

As seen from the extensive time spent by both petitioner and respondents on retelling the facts, they are both complex and unique. Although there are over 6400 FmHA loans with a value of two billion dollars, held by the Private Trust, there is no other reported case of the need for facility users to enforce their right of action under the Loan Resolution. This recorded case alone presents the bizarre scenario of a FmHA financed borrower declaring war on its own customer base and seeking to restrict its service territory, thereby increasing the costs to its own users. Given both the uniqueness and complexity of the

facts, it is clear that this proceeding does not involve a question which merits the attention of this Court.

## III. THE PETITION CONTAINS NUMEROUS FACTUAL MISSTATEMENTS WHICH, IF RELIED ON, COULD LEAD TO AN IMPROVIDENT GRANT OF CERTIORARI.

Space prohibits a complete discussion of the petition's factual errors. The Maple Ridge Water Association [MRWA] has never supplied water to residents and petitioner's water customers have never voluntarily disconnected and returned to well water.[9] Petitioner misstates the water/annexation policy from 1959-1981[10] and from 1981-1990.[11]

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[9] Petitioner misleads the court when it implies that either the drilling of private wells or securing water from the MRWA are alternatives. The MRWA ceased to exist over 20 years ago, its mission having been completed when the pipes were laid at its expense and given to petitioner. Those pipes are now part of the property pledged by Sebring as security for its loan from FmHA. The MRWA never did supply its own water, bill customers or control the distribution system.

[10] Petitioner recited that it had consistently linked extension of water service with requests to annex or cooperate with annexation. This is simply not true. Petitioner has failed to establish that any of the named respondents had prior commitments to annex that they have not honored. None of the 37 tap-in agreements discussed at pages 11-12 of the petition were signed by any of the respondents or predecessor owners of their property. Furthermore, no respondent has ever been requested to cooperate with annexation until the November 1990 ordinance. During the tap moratorium, the alleged annexation policy was not implemented.

[11] Petitioner misstates that the water for annexation policy continued uninterrupted to present. Sebring abandoned this policy in order to secure FmHA financing. The issuance of a

Petitioner's dispute over the admissibility of the FmHA service area map is meritless. Resolving evidentiary disputes and questions of admissibilty is not an appropriate use of this Court's limited resources. The conclusion that the service area, at the very least, includes the service lines as they existed when the loan was made, can be reached without any assistance from the disputed service area map. The customer base upon which FmHA relied to guarantee the financial viability of the loan clearly includes the existing users in Smith Township and Beloit as well. The lower courts correctly relied on the map and concluded that all respondents reside within the service area as it existed at the time of the loan. Pet. 11a, 15a; 36 F.3d at 526, 527; Pet. 84a-85a. Petitioner's unhappiness with the admission and use of its own document is no basis for granting its petition. The writ of certiorari should be denied.[12]

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permit and tap to respondent Wayne without the condition of annexation supports this explanation. There is no evidence that Sebring implemented its water/annexation policy at any time between the date of the 1981 FmHA loan and enactment of Ordinance 1477-90 in November of 1990. Further City Manager Teiche stated in a letter dated July 26, 1988, to an applicant for extension of a water main, that Sebring "did not mandate annexation."

[12] As part of its FmHA application, Sebring provided a map, the validity of which petitioner disputes, that defined the service area, which included all of the villages of Sebring and Beloit and significant portions of Smith Township beyond the limits of existing water lines. FmHA used the service area map certified by Sebring and its engineer to define the service area referred to in Sebring's Loan Resolution. The service area map indicated Sebring's intention to continue to provide service to existing customers in Smith Township and to extend service within the service area where it was legal and feasible.

From the first meetings with FmHA through the final closing documents, extraterritorial users were part of the service area and user base.[13]

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[13] From the beginning of its discussions with FmHA, Sebring was aware of its "moral obligations" to continue to serve its extraterritorial customers. The application evolved with proposed elements of the water system improvement project being dropped and added, but through all this, contrary to petitioner's suggestion, Sebring's description of its service area did not change. Sebring was ultimately approved in 1981 for a $3,575,000 loan at five percent interest. The FmHA loan financed improvements which provided Sebring with a capacity of 2.5 million gallons per day. Sebring has never contended, nor could it, that there is insufficient water to serve respondents.

To qualify for funding, petitioner complied with FmHA requirements, many of which addressed petitioner's obligation to nonresident users. FmHA approved regulations, discuss the surcharge for nonresident users and prohibit any other discrimination against them. Sebring Water Regulations, Section 119, Resp. 19a. The temporary non FmHA bonds at 8% relied on a customer base of both nonresidents as well as residents to assure repayment of the loan. "Upon completion, project improvements are anticipated to serve all utility's present customers in and *outside the city limits.*" (emphasis supplied.) Sebring then refinanced with FmHA at 5% – below market rate. Sebring adopted a Loan Resolution as contained on a form provided by FmHA which set forth petitioner's obligations to the lender and its users. Pet. pp. 6-8. This resolution, was adopted as Resolution No. 575-81 on September 14, 1981. The Loan Resolution is required to be adopted prior to the loan closing and the start of construction. *See* 7 C.F.R. §1942.17(n). Crucial to this lawsuit are the loan resolution, and the regulation which prescribes its use, which explicitly create a direct cause of action by any customer against the borrower if services

It is disingenuous for petitioner to argue that the Bond Ordinance does not reference the term "service area." There was no need to, because the Bond Ordinance in its definition section incorporated by reference all of the Loan Resolution, including the continuing obligation to provide service. Sebring's ratification of its preparatory steps with FmHA means that the obligation to continue service has been incorporated into the Bond Ordinance. 7 C.F.R. §1942.17(n).

The lower courts correctly dismissed petitioner's absurd contention that there was no meeting of the minds. Pet. 15a, 36 F.3d 527. This Court should also.

## IV. BORROWER'S OBLIGATIONS TO NONRESIDENTIAL USERS SURVIVE THE SALE OF THE FMHA LOAN PORTFOLIO MANDATED BY THE OMNIBUS BUDGET RECONCILIATION ACT OF 1986.

Respondents' action to enforce the terms of the Loan Resolution, and secure money damages for those injured, would have been straightforward, had not FmHA been compelled by an act of Congress, the Omnibus Budget Reconciliation Act of 1986 [OBRA 1986], Pub. L. 99-509, §1001. OBRA 1986 required FmHA to divest its portfolio of over 6,400 rural development loans for small water supply systems and other community facilities programs

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are not provided even though it is legal and feasible to do so. The lower courts have correctly held that it is legal and feasible to provide service to respondents who all reside within the service area. Pet. 11a-12a, 36 F.3d at 526; 84a-85a. Finally Sebring lifted the freeze on water taps that had been imposed in the seventies during the period of water shortage, and agreed to extend service to *all* who desired within the service area.

to a private entity, the Private Community Program Loan Trust 1987 A [Trust]. The legislative history reflected merely a desire to reduce the size of the federal deficit; there was no discussion of Congressional intent to alter or limit its program to provide water to rural residents.

The transfer from FmHA to the Trust in no way affects or diminishes Sebring's obligation to continue existing water service and extend it within the service area until at least 2022. Furthermore, all parties to the transfer and present servicing of Sebring's loan maintain that all of Sebring's obligations under the original Loan Resolution and bond documents continue in full force and effect. Both the assignment documents and the loan sale agreements between FmHA and the Trust require that *all* obligations of the borrower survive the transfer except for the graduation provision which is not at issue here.

Petitioner's reliance on the enforceability or "bail-out" clause from Loan Resolution Form 442-47 is misplaced.[14] Petitioner wrongly used this as an excuse to deny continuation of service to respondents. As explained at trial, the language "shall be binding upon the association as long as the bonds are held or insured by the Government" applies only when interim financing, the temporary bonds, are never turned over to FmHA. It has never been used nor was it intended to permit a borrower to avoid the obligations under its Loan Resolution after it has received FmHA funding.

FmHA has confirmed this interpretation by a January 18, 1991, letter to petitioner reiterating that Sebring

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[14] For the full text of the enforceability clause, see fn 6 *supra*. This form has been superceded.

remained obligated to serve extraterritorial users notwithstanding FmHA's sale of the loans. Resp. 17a-18a. The lower courts correctly adopted this interpretation. Pet. 14a, 36 F.3d 527; 85a-86a.

On April 5, 1991, General Electric Capital Corporation [GECC], the current servicer of Sebring's note, by letter advised the Mayor and Village Solicitor Ken Cardinal that paragraph 14 was still binding and referred to the Memorandum of Understanding. Resp. 3a-9a. After GECC informed petitioner that the Trust considered Sebring to be bound by all conditions of the Loan Resolution, including paragraph 14's commitment to continue service to existing customers, the village adopted Resolution 805-91, which repealed Loan Resolution No. 575-81 in order to avoid its obligations to respondents, stating that the loan resolution "is of no further legal significance and is one only of historic purposes." Sebring Resolution No. 805-91.

GECC sent a subsequent letter to the village council, which stated in part:

> The Council apparently approved Resolution No. 805-91 without regard to the advice contained in our April 5, 1991 letter.
>
> This is to notify the Council that we do not accept the validity of the Council's repeal of Resolution No. 575-81 [the Loan Resolution]. The Loan Resolution remains a valid, binding and enforceable agreement between Sebring and the holder of the Bond.

Resp. 1a-2a.

If petitioner Sebring is allowed to disavow its obligations under the Loan Resolution and other loan documents, because of the "enforceability clause," Pet. 17-18, fn. 4, the loan will be considered defective. This "defect" occurs in all of the Community Facilities loans made

pursuant to Loan Resolution Form 442-47 and sold to the Trust. Under this MOU, FmHA can be required to repurchase any defective loan – including Sebring's. Once the loan is repurchased by FmHA, Sebring's obligation to continue service in paragraph 14 of the Loan Resolution is indisputable. This MOU itself then constitutes a type of insurance by the federal government. The lower courts reached the same ultimate conclusion, i.e. that the obligation to continue service survives the sale, with greater economy of governmental resources. This correct result should not be disturbed by granting the petition for certiorari.

## V. REVERSAL OF THE LOWER COURTS' HOLDING THAT THE OBLIGATIONS OF THE LOAN RESOLUTION SURVIVE FMHA'S FORCED SALE OF THE LOAN PORTFOLIO WOULD TRIGGER OPERATION OF THE MEMORANDUM OF UNDERSTANDING – A POTENTIAL TWO BILLION DOLLAR LIABILITY FOR TAXPAYERS.

If this Court were to grant certiorari and find, as petitioner urges, that Sebring's obligations undertaken in its 1981 Loan Resolution, including paragraph 14 and its continuation of service obligation, are no longer enforceable because of the forced sale by FmHA to reduce the deficit, petitioner's loan will be "defective." Under the MOU, FmHA must either replace it or buy it back. This Court's approval of petitioner's noncompliance with the Loan Resolution would encourage borrowers around the country to disavow both service and repayment obligations.

Ultimately, every loan made pursuant to Loan Resolution Form 442-47 could be deemed by the Trust to be

defective. These actions would trigger FmHA's requirement, under the MOU to substitute or repurchase defective loans – including Sebring's and some 6,500 others. Resp. 11a-17a. If petitioner succeeds, the federal government will have to find an additional two billion dollars to repurchase the loan portfolio, an expenditure we taxpayers can ill afford. The lower courts correctly held that all of the borrower's obligations continue unabated, and that the loan resolution is enforceable notwithstanding the sale of the loan. The petition for certiorari should be denied.

## VI. THE LOWER COURTS CORRECTLY FOUND A CAUSE OF ACTION EXISTS UNDER FMHA'S COMMUNITY FACILITIES LOAN PROGRAM AND THE CIVIL RIGHTS ACT FOR RESPONDENTS WHO ARE ENTITLED TO CONTINUING WATER SERVICE.

FmHA makes loans to non-profit associations, including petitioner, for water supply projects. 7 U.S.C. §1926(a)(1), discussed in *Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311, 312, n.1 (7th Cir. 1989). Respondents, as rural residents, are precisely the group Congress intended to benefit by making loans for water and sewer systems "all primarily serving farmers, ranchers, farm tenants, farm laborers, and *other rural residents*." 7 U.S.C. §1926(a)(1) (emphasis supplied). Earlier versions of the Act preclude water and sewer loans to towns of greater than 5500. Subsequent amendments have raised the threshold, but the focus remains rural residents, which the Sixth Circuit correctly found includes respondents. Pet. 18a, 36 F.3d 528.

FmHA requires the borrower to repay the loan, charge customers reasonable rates and continue and

extend service to all customers that could feasibly and legally be served. The last requirement – continuation and extension of service – was to ensure full implementation of the Congressional policy to provide safe drinking water to rural populations, including, in some instances, small towns.

> This provision [7 U.S.C. §1926(a)] authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water.

S. Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code, Cong. & Admin. News 2243, 2309 *see also id.* at 2305.

Water associations funded by FmHA such as petitioner, are required to accept new customers within the service area on demand. "[A]ny prospective user within [50 feet of the waterline] could receive water service. . . . simply by making application . . . The water district would then be under an obligation to provide the service, even if that provision would require a line extension or a road bore." *Glenpool Util. Services v. Water Dist. No. 2*, 861 F.2d 1211, 1213 (10th Cir. 1988).

To further ensure the security of the financing and the water supply to rural customers, in 1961 Congress added an additional prohibition which directly limits the options of respondents herein to secure an alternate supply of water. According to its legislative history, the purpose of this prohibition is two-fold:

> A new provision [7 U.S.C. §1926(b)] has been added to assist in protecting the territory served

> by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.

S. Rep. No. 566, 87th Cong., 1st Sess, *reprinted in* 1961 U.S. Code, Cong. & Admin. News 2243, 2309, *see also id.* at 2305. Case law has consistently and unanimously failed to find any exceptions from this express prohibition of competing water suppliers even when no threat to the fiscal integrity of the underlying loan has been established, *Glenpool Util. Services v. Water Dist. No. 2*, 861 F.2d 1211, 1213 (10th Cir. 1988); or when it means overriding the state's power of eminent domain. *City of Madison, Miss. v. Bear Creek Water Ass'n*, 816 F.2d 1057 (5th Cir. 1987) and *Moore Bayou Water Ass'n v. Town of Jonestown*, 628 F. Supp. 1367 (N.D. Miss. 1986). The ban on customers, whose service was financed by an FmHA loan, seeking an alternate water supply applies even when the borrower, new supplier and water customer were all willing to waive Section 1926(b). *Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311 (7th Cir. 1989).

"Section 1926(b) establishes a bright line rule; it unambiguously prohibits any curtailment or limitation of an *FmHA indebted association's* service by municipal annexation or inclusion . . . " *Pinehurst Enters. v. Town of Southern Pines*, 690 F. Supp. 444, 451 (M.D.N.C. 1988) (emphasis in original). *See also: Rural Dist. No. 3 v. Owasso Util. Auth.*, 530 F. Supp. 818 (N.D. Okla 1979).

> Courts have uniformly read the 1926(b) ban as:
> Unequivocal – it prohibits *any* curtailment or limitation of the service provided by a rural association by municipal expansion, and its applicability does not hinge on whether specific customers or areas were listed on or deleted

> from the loan forms or on the financial impact of the service decrease on the rural association.

*Jennings Water, Inc. v. City of North Vernon, Ind.*, 682 F. Supp. 421, 425 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (7th Cir. 1989) (emphasis in original).

Even though the stated purpose of this provision in judicial interpretations has been focused on assuring repayment of the *United States government*, Congress clarified that its interest in preserving the terms and conditions of the loan continues notwithstanding the fact that FmHA may no longer be the holder of the loan. "Applicability of Prohibition on Curtailment or Limitation of Service – Section 306(b) of the Consolidated Farm and Development Act (7 U.S.C. §1926(b)) shall be applicable to all notes or other obligations sold under this section [Pub. L. 99-509 §1001]." Agricultural Credit Act of 1987, Pub. L. 100-233 §803, 101 Stat. 1714, recorded at 7 U.S.C.A. §1929a note.

Under the absolute ban of 7 U.S.C. §1926(b), no other municipality or private franchise can provide water to respondents who are all within Sebring's FmHA service area. *CSL Utils. Inc. v. Jennings Water, Inc.*, 16 F.3d at 135. Sebring's willingness to terminate existing water customers curtails its customer base just as surely as would respondents' resort to a third party supplier. Petitioner cannot be permitted to twist the facts to fit the ruling in *CSL Utils. Inc.*, 16 F.3d at 135. No existing customers of the Sebring water system have ever disconnected Sebring's water to use their own wells. Resort to competing suppliers is illegal under 7 U.S.C. §1926(b). More importantly, resort to other sources, legal or not, is an impossibility. It is the poor quality of the water in the area and the loss of well water to strip mining that have inspired respondents' tenacious fight to protect their

right to Sebring's water. There is no alternate supply. If there were, respondents would not have sued for continuation of water under the Loan Resolution and would not be opposing this petition for certiorari.

Given the purpose of the loan program, Congress would not preclude users from seeking an alternate water supply if the loan sale terminated users' rights to continued water service by the FmHA financed borrower. Petitioner's argument that its obligation to serve extraterritorial customers ended upon transfer must fail in light of this pronouncement. 7 U.S.C. §1926(b).

Petitioners are simply wrong when they state that they have demonstrated that §1926(b) was not intended to benefit respondents. The cases addressing FmHA water loans are uniform that respondents are precisely whom Congress intended to benefit.

> [T]he primary beneficiaries of section 1926(b)'s ban on association service curtailment are not the associations themselves, but rather, the FmHA and the individual rural consumers who would not have inexpensive and reliable water service without FmHA-supported rural water associations.

*Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311, 317 (7th Cir. 1989).

FmHA Form 442-47, which was the Loan Resolution 575-81 approved by petitioner, contained language which gave respondents a direct right of action against petitioner if they were refused service when such service was legal and feasible. Pet. p. 7. This language was drafted pursuant to 7 C.F.R. §1942.17(n)(2)(vii) which contains the identical language. Pet. at 6. 7 U.S.C. §1989 delegates to the Secretary authority to promulgate implementing regulations. As discussed *supra*, 7 U.S.C. §1926(b), provides that no conditions or requirements may be imposed upon

those customers residing within the service area. This statutory framework creates enforceable rights but does not provide any enforcement mechanism. Thus, respondents have stated a claim under 42 U.S.C. §1983.

The following cases find that a cause of action can be founded on 42 U.S.C. §1983: *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) (finding a cause of action under the Medicaid Act and regulations thereunder to enforce reasonable reimbursement of hospitals); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (finding a cause of action under the National Labor Relations Act to protect labor rights against governmental interference). *Wright v. Roanoke Redev. & Hous. Auth.*, 499 U.S. 418, 427 (1986) (finding a cause of action for tenants based on H.U.D. regulations). Unlike *Suter v. Artist M*, ___ U.S. ___, 118 L. Ed. 2d 1, 14 & n. 13 (1992), in the instant case regulations promulgated by the Secretary of Agriculture to enforce the Consolidated Farm and Rural Development Act, 7 U.S.C. §1921 et seq., establish a right to continuation of water service and condition receipt of federal moneys on the borrower's agreement to continue to provide water to new and existing customers within the service area. 7 C.F.R. §1942.17(n)(2)(vii). *See also* 7 C.F.R. §1942.17(b)(3); 7 C.F.R. §1942.17(d)(1)(i); 7 C.F.R. §1942.17(g)(2)(i)(B); 7 C.F.R. §1942.17(h)(2); and 7 C.F.R. §1942.19(10).

Petitioner cites *Ashbrook v. Block*, 917 F.2d 918, 926 (N. Jones, J.) and its Sixth Circuit progeny for the proposition that no cause of action may be found under the Consolidated Farm and Redevelopment Act against the FmHA itself for the way in which it administered a direct loan program to farmers, unrelated to 7 U.S.C. §1926(b). The

regulatory and statutory schemes and facts are so different that the cases are totally inapposite, which distinction did not escape Judge Jones who also wrote the opinion in *Ashbrook. Smith v. Dearborn Fin. Servs.*, 982 F.2d 976 (6th Cir. 1993) is distinguishable; the federal credit union regulations did not provide for a cause of action – FmHA's do.

Congress has established no comprehensive federal scheme that a §1983 action would frustrate. Rather, a §1983 action is essential in this case to effect Congress's policy of supplying water to rural residents.

Nor does 7 U.S.C. §1926(a)(20) aid petitioner's position. *Graham v. Goodcell*, 282 U.S. 409, 418 (1931) (allowing explicit retroactive changes to the tax code) is distinguishable from the new §1926(a)(20), which is not expressly retroactive, and has no legislative history at all, let alone one which would support implying retroactivity. " '[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.' " *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S.Ct. 1483, 128 L. Ed. 2d 256 (1994) (declining to apply certain Title VII provisions for damages retroactively to pending cases.) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

## VII. THE LOWER COURT GRANTED JUDGMENT TO RESPONDENTS BASED UPON A VIOLATION OF FEDERAL LAW

The Sixth Circuit clearly defined the basis for the holding of the Trial Court:

> The district court provided three separate rationales for directing a verdict in Plaintiffs' favor on the issue of liability: first, that Sebring violated Plaintiffs' procedural due process rights;

> second, that Sebring violated its own Loan Resolution; and third, that Sebring violated the Consolidated Farm and Rural Development Act, 7 U.S.C. §1921 *et seq.* If we agree with even one of these rationales, we are obliged to affirm.

36 F.3d 525, Pet. 11a.

The Court of Appeals declined to reach the constitutional due process issue, *id.* at 525, but it did find that Sebring had violated its Loan Resolution and had violated 7 U.S.C. §1926(b). The Court of Appeals also held that respondents had stated a claim under 42 U.S.C. §1983. The Loan Resolution was required to be passed by 7 C.F.R. §1942.17(n)(2)(vii). This clearly provides a basis for the lower courts' holding that respondents have substantial federal law claims and therefore exercise of supplemental jurisdiction would be appropriate. 28 U.S.C. §1367(a).

If this Court were to find the statutory analysis unpersuasive, this Court could still affirm based upon the constitutional due process ground. Continued water and sewer service is a property interest that is entitled to due process protection. *Ransom v. Marrazzo*, 848 F.2d 398, 409 (3d Cir. 1988). The state law cases cited by petitioner have no application to the unique facts herein. Ohio law might not require a municipality to *extend* its water or sewer services beyond its municipal boundaries under certain circumstances. The facts herein, however, are a *continuation* of water and sewer services, not extension. Under these facts, Ohio law does require a continuation of service for a reasonable period of time. *Grandview Heights v. Columbus*, 174 Ohio St. 473, 190 N.E.2d 453 (1963). This is an interest that is entitled to due process protection.

## VIII. THE COURT OF APPEALS CORRECTLY REMANDED TO THE DISTRICT COURT THE ISSUE OF EXTENDING THE INJUNCTION TO ROBERT AND SHARON ROUSE REGARDING SEWER SERVICE

Evidence was presented at trial by stipulation and testimony that two of respondents' households were sewer customers and whose service was threatened with termination by petitioner's policies underlying Ordinance 1477-90. The parties stipulated that Robert and Sharon Rouse had been connected to petitioner's Sanitary sewer system since 1977 and that Ordinance 1477-90 applies to sewer service as well as water service. Respondent Judy Costello was similarly situated as the Rouses with regards to their sewer service. Respondent Judy Costello did testify at trial and therefore a ruling on her request for continuation of sewer service will necessarily also apply to the Rouses. This was sufficient as discussed by the Court of Appeals:

> Plaintiffs contend that the district court erred in failing to extend the injunction to protect customers of Sebring's sewer service. The Rouses requested this relief in the complaint, at trial, and by post-judgment motion. However, the court below did not address this request at all.

36 F.3d 531, Pet. at 25a.

Respectfully submitted,

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Michigan 48230
(313) 885-7588

STEVE J. EDWARDS
Counsel of Record
4030 Broadway
Grove City, Ohio 43123
(614) 875-6661

GE Capital

General Electric Capital Corporation
10777 Westheimer, Suite 1200
P.O. Box 420250,
Houston, TX 77242-0250
713 785-6055

May 9, 1991

The Members of the Council of
The Municipality of Sebring, Ohio

RE: City of Sebring, Ohio $3,575,000 Waterworks System First Mortgage Revenue Bond (the "Bond")

Ladies and Gentlemen:

The undersigned is the servicer for the holder of the above-captioned Bond. This letter is to follow up our letter to Messrs. J. Michael Pinkerton, Charles Tieche and Kenneth Cardinal, Esq., dated April 5, 1991, a copy of which is attached.

We have recently been furnished with a copy of the Council's Resolution No. 805-91, passed April 22, 1991. In that Resolution, the Council purports to repeal Resolution 575-81, which was entered into by Sebring in connection with the issuance of the Bond on September 14, 1981.

The Council apparently approved Resolution No. 805-91 without regard to the advice contained in our April 5, 1991 letter.

This is to notify the Council that we do not accept the validity of the Council's repeal of Resolution No. 575-81. Loan Resolution No. 575-81 remains a valid, binding and

enforceable agreement between Sebring and the holder of the Bond.

If you have any questions or would like to discuss this matter, please contact the undersigned.

GENERAL ELECTRIC CAPITAL CORPORATION, as Master Servicer for Community Program Loan Trust 1987 A

By: _____
Ted A. Rosenberg, Manager
Commercial Servicing

cc: Kenneth Cardinal, Esq., City Attorney
Brenda Williams, Esq.
Dennis W. Townley, Esq.
William Hagy
Francis J. Marini, Esq.
Karen D. Kendrick-Hands, Esq.

GE Capital

General Electric Capital Corporation
10777 Westheimer, Suite 1200
P.O. Box 420250,
Houston, TX 77242-0250
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April 5, 1991

J. Michael Pinkerton, Mayor
135 E. Ohio Avenue
Sebring, Ohio 44672

Charles Tieche, City Manager
135 E. Ohio Avenue
Sebring, Ohio 44672

Kenneth Cardinal, Esq., City Attorney
135 E. Ohio Avenue
Sebring, Ohio 44672

Re: City of Sebring, Ohio, $3,575,000 Waterworks Systems First Mortgage Revenue Bond

Gentlemen:

General Electric Capital Corporation (GECC) is Master Servicer for Community Program Loan Trust 1987 A (the Trust), which is the owner of the City of Sebring's $3,575,000 Waterworks System First Mortgage Revenue Bond (the Bond). The Bond was originally issued to the Farmers Home Administration (Farmers Home or FmHA) on December 28, 1982, and was sold to the Trust on September 23, 1987.

GECC has received telephone calls and correspondence from Francis J. Marini, Esq. and Karen D. Kendrick-Hands, Esq. with respect to Ordinance No. 1477-90,

enacted by the Sebring City Council on November 26, 1990, and Ordinance No. 1481-90, enacted on December 27, 1990 (together, referred to herein as the Ordinances). Mr. Marini and Ms. Kendrick-Hands assert that as a result of the passage of the Ordinances the administration of City of Sebring has been refusing to allow the transfer of Sebring water service to properties located outside of the corporation limits of Sebring upon a sale of the properties. They argue that this policy violates the terms and conditions of the "Loan Resolution, Bond Ordinance, Bond and Indenture of Mortgage" relating to the Bond (collectively, the Bond Documents). They specifically refer to Section 14 of the Loan Resolution (FmHA Form 442-47), dated September 14, 1981, between Sebring and Farmers Home (Loan Resolution) which requires Sebring to "provide adequate service to all persons within the service area who can feasibly and legally be served and to obtain FmHA's concurrence prior to refusing new or adequate services to such persons".

Mr. Marini and Ms. Kendrick-Hands state that they have been told by Mr. Cardinal, the City Attorney, that he believes that the terms and conditions of the Loan Resolution are no longer applicable because FmHA no longer holds the Bond.

After talking to Mr. Marini and Ms. Kendrick-Hands and reviewing their correspondence, representatives of the Trust and GECC spoke on the telephone with Mr. Tesch. Mr. Tesch explained the background to the Ordinances and answered questions about the number of water users outside the corporation limits of Sebring and the effect of the Ordinances on those users.

Neither the Trust nor GECC, as Master Servicer, has any interest in becoming involved in political issues between Sebring and its water users. The Trust and GECC also recognize that the Bond is not currently in monetary default. However, we must inform you that all provisions of the Bond Documents are enforceable by the Trust against Sebring in accordance with their terms. And it our understanding that Farmers Home agrees with this position. Any breach by Sebring of its obligations under the Bond Documents would be a serious matter.

Mr. Marini and Ms. Kendrick-Hands have suggested that Mr. Cardinal may be relying upon the following language of the Loan Resolution to support his argument that the provisions of the Bond Documents, including Section 14 of the Loan Resolution, are no longer binding upon Sebring:

> "The provisions hereof and the provisions of all instruments incident to the making or the insuring of the loan, unless otherwise specifically provided by the terms of such instruments, shall be binding upon the association so long as the Loans are held or insured by the Government".

If the City Attorney is relying upon this sentence (hereinafter referred to as the Enforceability Language) to abrogate Sebring's obligations under the Loan Resolution, his reliance is misplaced for the reasons described below.

## EXPLANATION OF ENFORCEABILITY LANGUAGE

The Bond (and the Bond Documents) are freely transferable. They contain no restrictions on transfer. The

Bond is stated to be a negotiable instrument, with provisions which deal with its registration and transfer. And Sebring has acknowledged the transfer of the Bond to the Trust. Yet the Enforceability Language, when read literally, appears to impair the ability of a transferee to enforce provisions of the Bond and the Bond Documents.

To resolve this apparent conflict between the Enforceability Language and the transferability of the Bond and the Bond Documents one must examine Loan Resolution Form 442-47 in its entirety as well as the context in which the Form was used by Farmers Home. One must read Form 442-47 in a way that gives full effect to its terms and the terms of the other Bond Documents entered into in connection therewith, including the terms permitting transfer of the Bond.

The Enforceability Language, if read literally, arguably would not only release Sebring from complying with the requirements of Section 14 of the Loan Resolution if, as is now the case, the government no longer hold Sebring's Bond, but would also release Sebring from *all* the covenants in all of the Bond Documents, unless otherwise specifically provided by the terms of such instruments. The Enforceability Language does not differentiate between Sebring's obligations under Section 14 of the Loan Resolution and its promise to repay the Bond. Such a reading, which would make the Bond unenforceable by a transferee, conflicts directly with the fact that the Bond was made transferable. The reconciliation of this apparent conflict is found in the provisions of the Consolidated Farmers Home Administration Act of 1961 (the Farmers Home Act).

Form 442-47 is one of the many documents that a borrower is obligated to sign during a Farmers Home loan application process that can take years to complete. It is signed long before a borrower offers its bond for sale. (Sebring's Form 442-47 was signed approximately 15 months before the Bond was issued). The Enforceability Language was added to Form 442-47 to release a borrower from its responsibilities under its bond documents if its bond is not actually purchased by the government; it was not intended to make a bond or related documentation unenforceable in the hands of a transferee.

Other provisions of Form 442-47 support this reading. For example, the introductory paragraph states:

> WHEREAS, the [borrower intends to obtain assistance from the Farmers Home Administration, United States Department of Agriculture (herein called the Government) acting under the provisions of the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 at seq. (sic)), in the planning, financing, and supervision of such undertaking and to purchasing of bonds lawfully issued, in the event that no other acceptable purchaser for such bonds is found by the [borrower].

This paragraph sets forth a precondition to the validity of Form 442-47 and the other bond documents: that the government purchase the borrower's bond. This precondition readily explains the Enforceability Language, for none of the provisions of the bond documentation would be binding as between the government and a borrower if the government did not purchase the bond because another suitable purchaser is found, then all provisions of the bond documentation are released and

the other purchaser will work out its own agreements with the borrower.

The precondition set forth above is based upon the provisions of the Farmers Home Act which state that a loan applicant will not be eligible unless he certifies that he is "unable to obtain sufficient credit elsewhere to finance his actual needs at reasonable rates and terms. . . . " 7 US.C. § 1983(a). This requirement is consistent with the Farm Home Act's purpose to fund improvements at below market rates for rural communities and to do so only if they cannot find reasonable credit elsewhere.

The importance of this precondition to the making of the loan is further shown in the Farmers Home Act's requirement of "an agreement by the borrower that if at any time it shall appear to the Secretary that the borrower may be able to obtain a loan . . . at reasonable rates and terms . . . the borrower will, upon request by the Secretary, apply for and accept such loan. . . . " 7 U.S.C. § 1983(c). This legislative directive is incorporated as a covenant in paragraph 2 of Form 442-47. The next purchaser or lender will create a new loan agreement with the borrower in connection with the refinancing of the bond. Thus, a principal purpose of the Farmers Home Act is to encourage a borrower to obtain funds from a source other than the government.

The Enforceability Language was inserted in Form 442-47 to cover those circumstances where the loan was originated by someone other than the government. It was not intended to invalidate a transfer to another party of a loan made by the government or to restrict the rights of the transferee of that loan.

We would also like to call your attention to a Memorandum of Understanding (MOU), dated September 13, 1989, between the Trust and Farmers Home. Under the MOU, if a court of competent jurisdiction were to hold that Section 14 of the Sebring Loan Resolution were unenforceable against Sebring because the Bond is now held by the Trust, the Trust would have the right to return the Bond to Farmers Home for a replacement bond. The effect of such a transfer to Farmers Home would be to reinstate any obligations of Sebring under the Loan Resolution that Sebring has called into question because of the Enforceability Language.

This letter is sent to you for your information. The Trust and the Master Servicer do not want to get involved in a local political dispute. However, the Trust and the Master Servicer would view an abrogation by the City of Sebring of its responsibilities under Section 14 of the Loan Resolution to be a breach of the Loan Resolution, giving rise to the Trust's and the Master Servicer's rights and remedies under the Bond Documents with respect to such a breach.

We are interested in discussing this matter with you whenever it is convenient.

Very truly yours,

GENERAL ELECTRIC CAPITAL CORPORATION

By: _____

Name: Ted A. Rosenberg
Title: Manager, Commercial Servicing

cc: Brenda Williams, Esq.
Counsel to GECC
Dennis W. Townley, Esq.
Counsel to the Trust
William Hagy
Farmers Home Administration
Francis J. Marini, Esq.
Karen D. Kendrick-Hands, Esq.

## MEMORANDUM OF UNDERSTANDING (MOU) REGARDING ENFORCEABILITY REPRESENTATIVES

This Memorandum of Understanding Regarding Enforceability (Agreement) is entered into as of this *13th* day of *September,* 1989, by and between the United States of America, acting by and through the Farmers Home Administration (Farmers Home) and the Community Program Loan Trust 1987 A (the Trust) in order to confirm and clarify certain representations and warranties made by Farmers Home in the Loan Sale Agreement between Farmers Home and the Trust, dated as of September 1, 1987 (the Loan Sale Agreement), and in the Loan Substitution Agreement, Amended and Restated as of November 1, 1988 (the Loan Substitution Agreement).

All terms used, but not defined, herein shall have the meanings assigned to such terms in the Loan Sale Agreement or the Loan Substitution Agreement, as the context indicates.

WHEREAS, Farmers Home made certain representations and warranties as to the enforceability of each Original Loan in Section 3.02(d) of the Loan Sale Agreement (the Enforceability Representations).

WHEREAS, Section 4.04(a) of the Loan Sale Agreement and Section 3.01 of the Loan Substitution Agreement provide that the Enforceability Representations, as modified by Section 4.04(b) of the Loan Sale Agreement, are deemed to have been made as of the Settlement Date with respect to Substitute Loans;

WHEREAS, certain of the Original Loans and certain of the Substitute Loans contain Loan Resolution Form No.

442-47 or Loan Resolution Form No. 1942-47 having revision dates of 8/6/68 or thereafter, but before revision date of 3/89 (referred to herein as the Resolutions or a Resolution) in their Loan Files (such Loans are collectively referred to herein as the Limited Enforcement Loans).

WHEREAS, certain language contained in the Resolutions, which is set forth on Schedule A hereto (the Limited Enforceability Clauses), may be construed to limit or prevent the enforcement, by any person other than Farmers Home, of certain provisions of the Loan Documents relating to the Limited Enforcement Loans.

WHEREAS, the Limited Enforcement Loans may not have complied on the date that such Loans were sold or transferred to the Trust, and may not comply as of the date hereof, with the Enforceability Representations.

WHEREAS, some Substitute Loans include in further Substitution Groups may not comply with the Enforceability Representations because they will be Limited Enforcement Loans.

WHEREAS, although, pursuant to Section 3.06(a) of the Loan Sale Agreement with respect to the Original Loans and pursuant to Section 4.04(a) of the Loan Sale Agreement and Section 3.01 of the Loan Substitution Agreement with respect to the Substitute Loans, the Enforceability Representations do not expire, the Trust desires that Farmers Home confirm to the Trust that if any Limited Enforcement Loan or any provision of a

Resolution relating thereto which is material to the collectibility of payments of principal and interest and any covenant to maintain reserves and insurance for the benefit of such Loan, is not enforceable by the Trust because of a Limited Enforceability Clause, the Trust will be entitled to tender such Loan to Farmers Home as a Defective Loan.

WHEREAS, the parties have determined to enter into this Agreement to confirm the applicability of the Enforceability Representations to Limited Enforcement Loans.

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties hereto agree as follows:

1. The Trust and Farmers Home mutually agree that if a Limited Enforcement Loan, or any provision of a Resolution relating thereto which is material to the collectibility of payments of principal and interest and any covenant to maintain becomes unenforceable, as defined in paragraph 2 below, by the Trust because of a Limited Enforceability Clause, the Loan will be deeded to have violated the Enforceability Representations and Farmers Home shall permit, and shall accept, tender by the Trust to Farmers Home of any such Limited Enforcement Loan as a Defective Loan pursuant to the Substitution Group and Cash Settlement Amount procedures set forth in Section 4.01(b) of the Loan Sale Agreement. Farmers Home hereby confirms that the tender shall be permitted and accepted by Farmers Home without regard to any time limitation. The tender may be made at any time prior to payment in full of any such Loan if the Trust shall certify to Farmers Home, as provided in paragraph

2 below, that the Loan, or any provision of a Resolution relating thereto which is material to the collectibility of payments of principal and interest and any covenant to maintain reserves and insurance for the benefit of such Loan, is unenforceable.

2. The Trust may certify to Farmers Home that a Limited Enforcement Loan is unenforceable, as described in paragraph 1 above, if a court shall have held that the Loan, or any provision of a Resolution relating thereto which is material to the collectibility of payments of principal and interest and any covenant to maintain reserves and insurance for the benefit of such Loan, is unenforceable by the Trust because of a Limited Enforceability Clause. Although the Trust shall have no general obligation to appeal any such holdings, the Trust, at the written request of Farmers Home, shall appeal at least one (1) court decision to the highest court with jurisdiction over such matters in each individual state. If the lower court's ruling is affirmed on appeal, the Trust may exercise its rights under paragraph 1 above with respect to such Limited Enforcement Loan and with respect to similarly situated Limited Enforcement Loans within that state. If the final decision on appeal is such that the Loan would not violate the Enforceability Representations, the Trust shall not be entitled to tender the Loan to Farmers Home pursuant to this Agreement. Notwithstanding the foregoing no decision by any court regarding a Limited Enforcement Loan shall affect the rights of the Trust hereunder with respect to any other Loan unless the decision would be binding on the court having jurisdiction over such other Loan.

3. Nothing contained in this Agreement shall affect or negate the right of the Trust under the Enforceability Representations with respect to Loans that are not Limited Enforcement Loans.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date written above.

UNITED STATES OF AMERICA
acting by and through
Farmers Home Administration

By: _____
Acting, Administrator

COMMUNITY PROGRAM LOAN
TRUST 1987 A

By: Shawmut Bank, N.A., not
in its individual
capacity but solely as
1987 A Trust Trustee

By: _____
Name: Max Goldsmith
Title: VICE PRESIDENT

3

Consented to:

State Street Bank and Trust Company,
not in its individual capacity
but solely as Class A
Indenture Trustee

By: _____
Name: Denise M. Dever
Title: Assistant Vice President

Wilmington Trust Company,
not in its individual capacity
but solely as Class B
Indenture Trustee

By: _____
Name:
Title:

General Electric Capital
Corporation, not in its
individual capacity but
solely as Master Servicer

By: _____
Name:
Title:

United States Department of Agriculture
Farmer's Home Administration
742 Winkler Drive
Wooster, Ohio 44691
216-345-6791

January 18, 1991

Mr. Charles H. Tieche, City Manager
City of Sebring
135 East Ohio Avenue
Sebring, Ohio 44672

Re: Sebring Water System

Dear Mr. Tieche,

In response to your letter regarding the subject project, we offer the following comments:

1. Farmers Home Administration's (FmHA) loan to the City of Sebring to finance the subject project was sold to General Electric Capital Corporation (GECC) in 1987.

2. FmHA is not providing a loan or payment guarantee to GECC.

3. The City of Sebring's direct obligations to FmHA ceased when the loan was assigned to GECC. These obligations to FmHA, including all payments, reports, etc.) were transferred to GECC along with the loan.

4. The City of Sebring is still obligated to the terms and conditions of the Loan/Bond Resolution(s) entered into at the time they obtained FmHA financing for the subject project.

    a) The City now is simply obligated to GECC instead of FmHA.

    b) The City is still obligated to provide service (water) to all areas that can be engineeringly and economically feasibly

served. However, it is up to the City and their engineers to determine the feasibility.

We trust this response answers your concerns, if you have any additional concerns or questions, please feel free to contact this office at (216) 345-6791.

Sincerely,

Marvin E. Aylsworth
Assistant District Director

Sebring Water Regulation, Section 119 – Each consumer of the Water and/or Sewer Service provided by the Division of Water and Sewer shall be governed by and shall be deemed to have agreed to be so governed by making application for such service(s) all of the Ordinances and Regulations relative to the construction, maintenance and operation of the Water and Sewer Systems; and the same shall extend to all consumers of said service(s) whether located within or without the corporate limits of the Municipality of Sebring, Ohio: and the jurisdiction of the Division of Water and Sewer and the Division of Police for the enforcement there of shall extend into and over any territory outside of the said corporate limits so serviced. (cf. Section 743.13 O.R.C.)